TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 474.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

THE AMERICAN BREWING COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

FILED AUGUST 1, 1919.

(27229)

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1 United States of America, Supreme Court of the United States.

UNITED STATES, PLAINTIFF IN ERROR
vs.
AMERICAN BREWING COMPANY, DEFENDANT IN ERROR } No. 4506. (Criminal docket.)

Henry Mooney, United States Attorney, for the United States, plaintiff in error.

Messrs. John P. Sullivan, Lemle & Lemle, Edgar M. Cahn, Carroll & Carroll, Buck, Walshe & Buck, and Milling, Godchaux, Saal & Milling, for American Brewing Company, defendant in error.

Writ of error to the United States District Court for the Eastern District of Louisiana, New Orleans division, from the Supreme Court of the United States, returnable within thirty (30) days from the sixteenth (16th) day of July, A. D. 1919, at city of Washington, District of Columbia.

2 *Indictment filed July 15, 1919.*

UNITED STATES
vs.
AMERICAN BREWING COMPANY. } No. 4506.

United States District Court, Eastern District of Louisiana, New Orleans Division.

In the District Court of the United States, in and for the Eastern District of Louisiana, New Orleans division, at the May term thereof, A. D. 1919,

The grand jurors of the United States, empaneled, sworn and charged at the time aforesaid of the court aforesaid, on their oaths present that the American Brewing Company, a corporation organized under the laws of the State of Louisiana, at New Orleans, in the New Orleans division of the Eastern District of Louisiana, on the 26th day of June, 1919, wilfully and knowingly did unlawfully use certain grains, cereals, and other food products, to wit, five hundred pounds (500 lbs.) of malt, one hundred and ten pounds (110 lbs.) of hops, two thousand one hundred pounds (2,100 lbs.) of grits, and two hundred pounds (200 lbs.) of maltine, (the latter being sugar glucose), in the manufacture and production of a large quantity of beer, to wit, two hundred (200) barrels of beer, for beverage purposes, which said beer so manufactured and produced as aforesaid, then and there cantained as much as one-half (½) of one per cent (1%) of alcohol by both weight and volume; the termination of demobilization not being then and there determined
3 and proclaimed by the President of the United States; con-

trary to the form of the statute in such cases made and provided and against the peace and dignity of the United States.

(Signed) HENRY MOONEY,
United States Attorney.

A true bill.
New Orleans, La., July 15, 1919.
(Signed) ALFRED WILKENS, *Acting Foreman.*

(Endorsed on back:) No. 4506. United States District Court, Eastern District of Louisiana, New Orleans division. United States v. American Brewing Company. Indictment. Violation of the act of November 21, 1918. Filed July 15, 1919. (Signed) H. J. Carter, clerk. Henry Mooney, United States attorney.

4 *Notice of filing demurrer in open court, extract from the minutes.*

May term, 1919.

NEW ORLEANS, *Tuesday, July 15th, 1919.*

Court met pursuant to adjournment; present, Hon. Rufus E. Foster, judge.

UNITED STATES
vs.
AMERICAN BREWING COMPANY. } No. 4506.

This day, in open court, appeared John P. Sullivan and Lemle and Lemle, attorneys for the American Brewing Company, the accused herein, and interposed a demurrer on behalf of said defendant to the indictment herein;

Whereupon, it was ordered by the court that the said demurrer be filed.

5 *Demurrer of American Brewing Company. Filed July 15, 1919.*

In the District Court of the United States for the Eastern District of Louisiana.

UNITED STATES OF AMERICA
vs.
AMERICAN BREWING COMPANY. }

Demurrer.

American Brewing Company, the defendant herein, by its attorneys, demurs to the indictment herein and says that the same is bad in substance and insufficient in law.

And for grounds of said demurrer the defendant says:

1. That said indictment fails to allege the doing of anything or the commission of any act which is forbidden by or contrary to any law or statute of the United States.

2. Said indictment fails to allege sufficient facts to constitute a violation of any law or statute of the United States.

3. No law or statute of the United States forbids or makes unlawful or did forbid or make unlawful on July 15th, 1919, the use of grains or other food products, as alleged in the indictment, in the manufacture or production of beer for beverage purposes containing as much as one-half of one per cent of alcohol by both weight and volume.

4. The act or thing charged in the indictment is not forbidden or made unlawful by any law or statute of the United States unless the beer so produced is intoxicating, and the indictment fails to allege that the beer so made was in fact intoxicating.

5. The act of Congress of the United State approved November 21st, 1918, a violation of which is charged in the indictment, relates only to beer which is in fact intoxicating, and the indictment fails to allege that the beer manufactured was in fact intoxicating.

6 6. The aforesaid act of Congress does not make unlawful as charged in the indictment the use of food products in the manufacture of beer for beverage purposes "containing as much as one-half of one per cent of alcohol both by weight and volume"; it makes no reference to the percentage of alcohol contained, nor does it ever refer to the presence of alcohol, but makes the test solely whether the beer so made is or is not in fact intoxicating.

7. The aforesaid act of Congress is, so far as it may be construed to forbid the use on July 15th, 1919, of food products in the manufacture of beer for beverage purposes unconstitutional and void, in that Congress had at the time of the passage of the act no power to forbid such use or manufacture unless the same was necessary as a "war measure" for the public security, and on July 15th, 1919, no war affecting the United States was in progress, nor did any public necessity or emergency exist requiring or justifying such prohibition.

8. The aforesaid act of Congress relates, so far as it prohibits the use of food products in the manufacture of beer for beverage purposes, only to beer of the kind commonly supposed or understood to be intoxicating beer and beer containing as small a percentage of alcohol as that charged in the indictment, to wit, one-half of one per cent both by weight and volume, is not commonly supposed or understood to be intoxicating beer and is, therefore, not the kind of beer referred to in the act in question.

9. The aforesaid act of Congress of the United States approved November 21, 1918, provides that nothing therein shall be construed to interfere with the power conferred upon the President under section 15 of the food control act of August 10, 1917. In pur-

7 suance of the power conferred upon him by said food-control

act the President did, by his proclamations issued January 30, 1919, and March 4, 1919, permit the use of grain and food products in the manufacture of malt beverages which are not in fact intoxicating, and said act of November 21, 1918, therefore, does not prohibit and has not prohibited since the issuance of said proclamations the use of such grain or food products in the manufacture of beer or other malt liquor which is not in fact intoxicating.

10. The indictment undertakes improperly and without justification in law to define the kind of beer referred to in the act of Congress of the United States approved November 21, 1918, whose violation is charged in the indictment. The attempted definition is "beer containing as much as one-half of one per cent of alcohol both by weight and volume." No such definition is contained in or intended by or reasonably to be construed to be implied in the act in question, but said definition of "beer," as used in the said indictment, is based solely on the test or standard applied in laws or regulations relating solely to matters of revenue or taxation.

11. The aforesaid act of Congress approved November 21, 1918, applies only to "beer, wines, or other intoxicating malt or vinous liquors for beverages purposes"; the indictment fails to allege facts from which it may be reasonably understood or assumed that the beer referred to in the indictment was "an intoxicating liquor" and therefore fails to charge facts constituting a violation of the act.

12. The aforesaid act of Congress declared the "beer" therein referred to to be "an intoxicating malt liquor" and hence refers and was intended to refer only to the kind of beer which is "intoxicating beer," and the kind of beer set forth in the indictment, to wit, that containing "as much as one-half of one per cent of alcohol,"
8 not only is not alleged and can not be assumed to be "intoxicating," but in fact is and must be judicially recognized to be nonintoxicating, and therefore, is not the kind of beer referred to or prohibited by the act in question.

13. The aforesaid act of Congress, insofar as it forbids the use after May 1, 1919, of food products in the manufacture for beverage purposes of "beer, wire, and other intoxicating malt or vinous liquors," does not purport to be a food conservation statute, but a measure designed to conserve the man power of the Nation by preventing the use of intoxicants, and the indictment fails to allege any facts showing that the defendant manufactured for beverage purposes any intoxicating beer or intoxicant of any kind, or that the "beer" so made by it was or is of the kind referred to and intended to be reached by said act.

14. The aforesaid act of Congress approved November 21, 1918, insofar as it purports to apply to the production, manufacture or sale of beer, wine, or other intoxicating malt or vinous liquor for beverage purposes is unconstitutional and void, because in excess of and unauthorized by any power delegated to or vested in the Congress or any department or officer thereof under and by virtue of the Constitution of the United States.

15. And for other grounds to be assigned at the hearing.

(Signed) JOHN P. SULLIVAN,
" LEMLE & LEMLE,
Attorneys for the Defendant, American Brewing Company.

(Signed) EDGAR M. CAHN,
" CARROLL & CARROLL,
" BUCK, WALSHE & BUCK,
" MILLING, GODCHAUX, SAAL & MILLING,
Of Counsel.

9 *Judgment of the court sustaining demurrer; extract from the minutes.*

May term, 1919.

NEW ORLEANS, *Tuesday, July 15th, 1919.*

Court met pursuant to adjournment; present: Hon. Rufus E. Foster, judge.

UNITED STATES
vs.
AMERICAN BREWING COMPANY. } No. 4506.

This cause came on this day to be heard upon the demurrer filed by the defendant to the indictment herein, and was argued by counsel for the respective parties;

Whereupon, and on due consideration thereof, it is ordered, adjudged, and decreed by the court that the said demurrer herein be, and the same is hereby, sustained, that the said indictment herein be quashed, and that the defendant, the American Brewing Company, be discharged without day in the premises.

10 *Motion and order for writ of error. Filed July 16, 1919.*

United States District Court, Eastern District of Louisiana, New Orleans Division.

UNITED STATES
vs.
AMERICAN BREWING COMPANY. } No. 4506.

On motion of the United States herein appearing by Henry Mooney, United States attorney, and on suggesting error to the prejudice of the United States in the judgment rendered in this case on the 15th day of July, 1919, sustaining the demurrer filed in this case by the defendant, and on further suggesting the assignment of errors herein filed.

It is ordered that a writ of error be granted the United States, returnable within thirty days from this date to the Supreme Court

of the United States, at Washington, D. C., and that the said writ of error act as a supersedeas, and the United States be dispensed from giving bond on said writ of error.

(Signed) RUFUS E. FOSTER, *Judge.*

JULY 16, 1919.

11 *Assignment of errors. Filed July 16, 1919.*

United States District Court, Eastern District of Louisiana, New Orleans Division.

UNITED STATES
v.
AMERICAN BREWING COMPANY. } No. 4506.

Assignment of errors.

Now comes the United States in this case praying for a writ of error and assigns the following errors in the proceedings, judgment, and decree of the trial court in this case, sustaining the demurrer of the defendant.

I.

The trial court erred in sustaining the demurrer to the indictment filed by the defendant.

II.

The trial court erred in not overruling and setting aside the demurrer filed by the defendant.

III.

That the trial court erred in its construction of the statute upon which this case is founded, and particularly in its construction and interpretation of the words "beer, wine, or other intoxicating malt and vinous liquor," in such statute, and in holding under its erroneous construction and interpretation of those words, that in order to charge an offense under the statute it is essential and sacramental to charge in the indictment that the "beer" manufactured out of the prohibited and named cereals, grains, and food products is "intoxicating beer."

IV.

12 That the court erred in its construction and interpretation of the words "beer, wine, or other intoxicating malt and vinous liquor" contained in the statute upon which this case is founded and in not holding that it was sufficient to charge in the indictment that the cereals, grains, and food products named therein

were, on the date specified, unlawfully used in the manufacture of "beer," for beverage purposes, without charging or setting out in the indictment that the "beer" so manufactured was "intoxicating beer."

And for these errors and others apparent on the face of the record, the United States of America prays that the said judgment of July 15, 1919, be reversed and the cause remanded for such other proceedings as may be proper, and that such other and further orders may be rendered as may be just.

(Signed) HENRY MOONEY,
United States Attorney.

13 *Præcipe for transcript. Filed July 24, 1919.*

United States District Court, Eastern District of Louisiana, New Orleans Division.

UNITED STATES
v.
AMERICAN BREWING COMPANY. } No. 4506.

Stipulation.

It is hereby stipulated and agreed by and between the plaintiff and defendant in error, through their attorneys, that the clerk shall include in the transcript of the record for the hearing of the writ of error herein sued out, the following:

I.

The indictment.

II.

The demurrer.

III.

The minute entry of the hearing, and the submission and judgment sustaining the demurrer.

IV.

The appeal papers.

(Signed) HENRY MOONEY,
United States Attorney for Plaintiff in Error.

(Signed) JOHN P. SULLIVAN,
(Signed) GUSTAVE A. LEMLE,
Attorneys for Defendant in Error.

(Signed) CARROLL AND CARROLL,
(Signed) MILLING, GODCHAUX & SAAL,
(Signed) BUCK, WALSHE & BUCK,
(Signed) EDGAR M. CAHN,
Of Counsel for Defendant in Error.

14 United States of America, District Court of the United States, Eastern District of Louisiana.

Clerk's office.

I, Henry J. Carter, clerk of the District Court of the United States for the Eastern District of Louisiana, do hereby certify that the foregoing 13 pages contain and form a full, complete, true and perfect transcript of the record, assignment of errors and proceedings in the case of the United States, versus American Brewing Company, No. 4506 of the criminal docket of the United States District Court for the Eastern District of Louisiana, New Orleans Division (made in accordance with the præcipe for transcript, copied at page 13 of said transcript).

Witness my hand, and the seal of said court, at the city of New Orleans, Louisiana, this 24th day of July, A. D. 1919.

[SEAL.] H. J. CARTER, *Clerk.*

15 *Issued for Henry Mooney, U. S. attorney.*

The United States of America, District Court of the United States, Eastern Division of Louisiana.

The President of the United States to the American Brewing Company, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, D. C., within 30 days from date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Eastern District of Louisiana, wherein the United States is plaintiff in error and the American Brewing Company is defendant in error, in the cause entitled United States versus American Brewing Company, No. 4506 of the criminal docket of the United States District Court for the Eastern District of Louisiana, to show cause, if any there be, why the judgment rendered against the said United States as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Rufus E. Foster, Judge of the United States District Court, at New Orleans, La., this 16th day of July, in the year of our Lord one thousand nine hundred and nineteen.

(Signed) RUFUS E. FOSTER, *Judge.*

Clerk's office: A true copy of the original. New Orleans, La., July 16th, H. J. Carter, clerk.

16 Received by United States Marshal, New Orleans, La.
July 17, 1919.

And on the 21st day of July, 1919, I served the original of which this is a certified copy on American Brewing Company, by handing same to Mr. E. G. Schlieden, president of said company, in person, in the city of New Orleans, La.

FRANK M. MILLER, *U. S. Marshal*,
By WALTER J. GRIFFIN, *Deputy*.

(Endorsed:) Return. United States District Court, Eastern District of Louisiana, No. 4506. United States vs. American Brewing Company. Citation on writ of error. Marshal's return. United States District Court, Eastern District of Louisiana, New Orleans Division. Filed July 24, 1919. H. J. Carter, clerk.

17 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable, the judge of the District Court of the United States for the Eastern District of Louisiana, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between United States, plaintiff, and American Brewing Company, defendant, No. 4506 of the criminal docket of the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, a manifest error hath happened, to the great damage of the said United States as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all the things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., within 30 days from the date hereof, in the said Supreme Court of the United States, to be then and there held; that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what, of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the said Supreme Court of the United States, this 16th day of July in the year of our Lord one thousand nine hundred and nineteen.

[SEAL.]

H. J. CARTER,
Clerk of the United States District Court
for the Eastern District of Louisiana.

Allowed by: Rufus E. Foster, judge.

(Endorsed:) United States District Court. No. 4506. (Criminal docket.) United States versus American Brewing Company. U. S. District Court, Eastern District of Louisiana, New Orleans Division. Filed July 16, 1919. E. Wendling, clerk.

(Endorsement on cover:) File No. 27229. E. Louisiana D. C. U. S. Term No. 474. The United States, plaintiff in error, vs. The American Brewing Company. Filed August 1st, 1919. File No. 27,229.

○

Office Supreme Court, U. S.
FILED
OCT 20 1919
JAMES D. MAHER,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1919—No. 474.

UNITED STATES OF AMERICA,
Plaintiff-in-error,

v.

AMERICAN BREWING COMPANY,
Defendant-in-error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

MOTION TO ADVANCE BY DEFENDANT-IN-ERROR.

ELIHU ROOT,
WILLIAM D. GUTHRIE,
WILLIAM L. MARBURY,
Of counsel for defendant-in-error.

Supreme Court of the United States.

OCTOBER TERM, 1919—No. 474.

UNITED STATES OF AMERICA,
Plaintiff-in-error,

v.

AMERICAN BREWING COMPANY,
Defendant-in-error.

IN ERROR TO THE DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA.

MOTION TO ADVANCE BY DEFENDANT-IN-ERROR.

Now comes the American Brewing Company, the defendant-in-error, and respectfully moves the advancement of the above-entitled cause for early hearing during the present term.

The cause is now pending in this court under a writ of error sued out by the Government under the provisions of the Criminal Appeals Act (34 Stat. 1246) to review a ruling sustaining a demurrer to an indictment found under the act of November 21, 1918 (40 Stat. 1045), forbidding the use of grains and other food products in the manufacture of beer, wine, or other intoxicating malt or vinous liquor for beverage purposes. The indictment alleged the use of certain grains and other food products in the manufacture of a quantity of beer containing as much as one-half of one per cent. of alcohol but did not allege that the liquor was intoxicating. A demurrer was interposed and sustained

because the indictment failed to allege that the beer in question was intoxicating, as required by the statute.

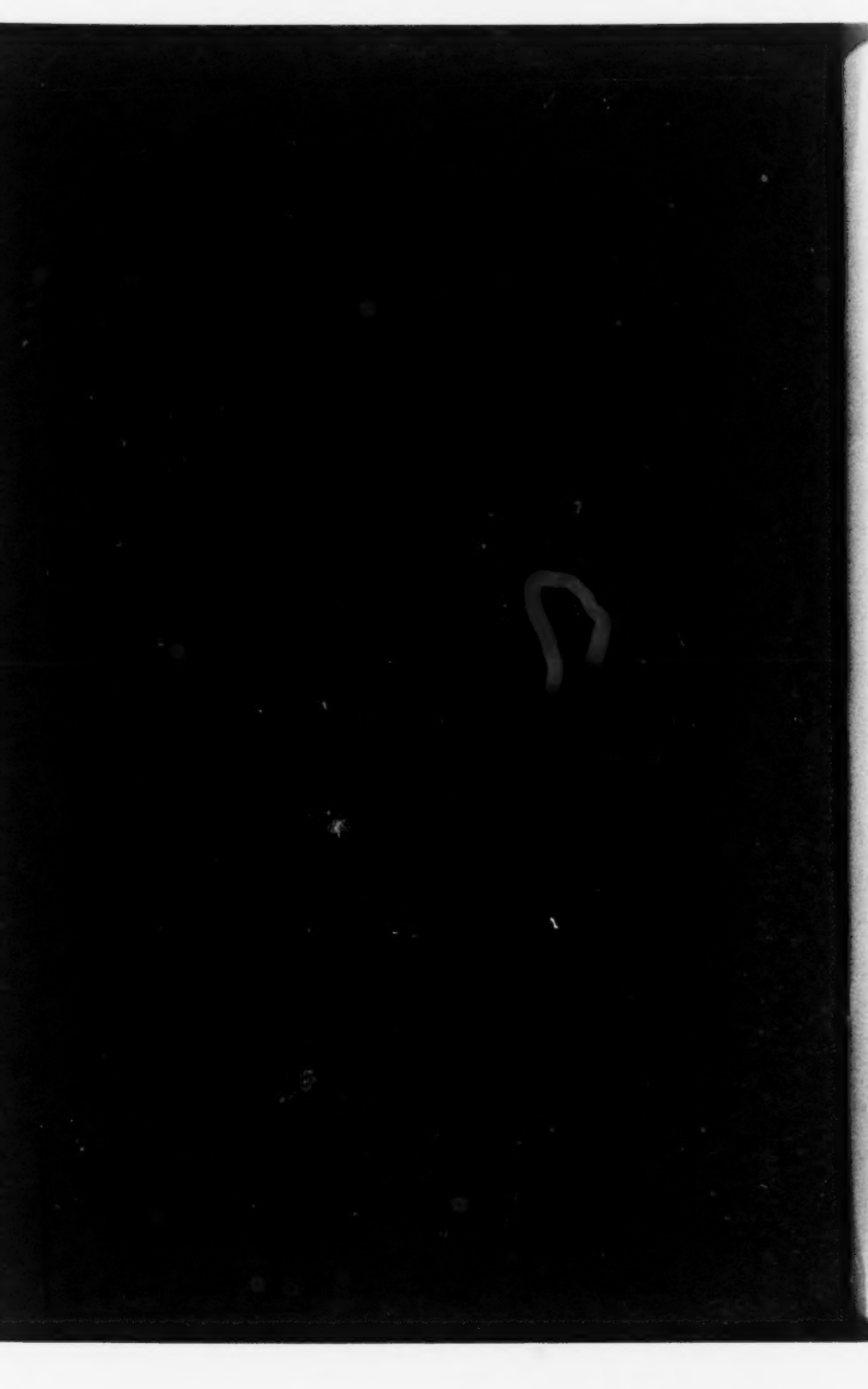
The case is similar to the case of *United States* v. *Standard Brewery, Incorporated,* October Term, 1919, No. 458, in which the Solicitor General has given notice of a motion to advance for early hearing, and it is desired that this cause be heard together therewith.

The question is one of general public importance and numerous cases now pending will be governed by the decision of the court herein. The Circuit Court of Appeals of the Second Circuit and the District Courts in the Southern District of New York, the District of Massachusetts, the District of Rhode Island, the District of Maryland, the Western District of Wisconsin, the Northern and Southern Districts of California and the District of Porto Rico have rendered decisions construing the statute in question in the same manner as the court below in the case at bar. The District Courts in the Western District of Pennsylvania and the Northern District of Illinois hawe ruled to the contrary. It is important, therefore, that an early decision be had in the case at bar.

Notice of this motion has been served on the Department of Justice.

October, 1919.

ELIHU ROOT,
WILLIAM D. GUTHRIE,
WILLIAM L. MARBURY,
Of counsel for defendant-in-error.



In the Supreme Court of the United States.

OCTOBER TERM, 1919.

UNITED STATES, PLAINTIFF IN ERROR,
v.
AMERICAN BREWING COMPANY,
No. 474.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

BRIEF FOR THE UNITED STATES.

This case arises under and involves the constitutionality and the construction of what is known as the war prohibition act of November 21, 1918 (40 Stat., c. 212, pp. 1045, 1046–7), which prohibits after May 1, 1919, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, the use of grains, cereals, fruit, or other food product in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquor for beverage purposes.

THE INDICTMENT.

The indictment charged that the defendant in error, while the prohibition in question was in effect, used certain grains, cereals, and other food products in the manufacture of beer containing as much as one-half of 1 per cent of alcohol by both weight and volume.

151235—19

THE DEMURRER.

A demurrer was filed challenging both the constitutionality of the statute and the construction which the Government put upon it. As to the latter, the demurrer was predicated upon the proposition that the act in question prohibited the manufacture only of such beer as was, in fact, intoxicating, and that since the indictment did not charge that the beer in question was intoxicating it charged no offense.

RULING OF THE COURT BELOW.

The court below sustained the demurrer without writing an opinion.

Government's contentions presented in cause No. 458, The United States of America v. Standard Brewery, Incorporated.

This case is to be heard at the same time as cause No. 458, *The United States of America* v. *Standard Brewery, Incorporated.* The questions involved are precisely the same in both cases. The Government's contentions have been fully presented in the brief filed in cause No. 458, and that brief is submitted on behalf of the Government in this case.

Respectfully submitted,

ALEX. C. KING,
Solicitor General.
WILLIAM L. FRIERSON,
Assistant Attorney General.

NOVEMBER, 1919.

○

Office Supreme Court, U. S.
FILED
DEC 8 1919
JAMES D. MAHER,
CLERK.

Supreme Court of the United States,

OCTOBER TERM, 1919,

No. 474.

THE UNITED STATES OF AMERICA,
Plaintiff-in-error,

v.

THE AMERICAN BREWING COMPANY,
Defendant-in-error.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF LOUISIANA.

BRIEF ON BEHALF OF DEFENDANT-IN-ERROR.

ELIHU ROOT,
WILLIAM D. GUTHRIE,
Of counsel for defendant-in-error.

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Supreme Court of the United States,

OCTOBER TERM, 1919, No. 474.

THE UNITED STATES OF AMERICA,
Plaintiff in-error,

v.

THE AMERICAN BREWING COMPANY,
Defendant-in-error.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

BRIEF ON BEHALF OF DEFENDANT-IN-ERROR

This writ of error presents for review a judgment of the District Court for the Eastern District of Louisiana sustaining a demurrer to an indictment attempting to charge a violation of the so-called Wartime Prohibition Act of November 21, 1918, being subdivision fourth of section 1 of the Agricultural Appropriation Act of that date (40 Stat. 1045, ch. 212). The court below delivered no written opinion. The defendant-in-error made a motion to advance the cause for early hearing, which was granted and the case advanced for argument on December 8, 1919.

The case at bar involves the interpretation of the above-mentioned portion of the act of November 21, 1918. The contention of the Government is that the prohibitions of

the statute, which are in terms applicable to "beer, wine, or other intoxicating malt or vinous liquor for beverage purposes," are to be construed as prohibiting *all* beer, whether intoxicating or not; while the contention of the defendant-in-error is that only *intoxicating beer* is prohibited. The latter view has been sustained by the Circuit Court of Appeals for the Second Circuit and ten district courts. The contrary view has been declared by two district courts and may be deemed to have some support in the opinions of two other district courts. The state of the decisions so far rendered on this question is considered more at length below.

The district court in the case at bar sustained the contention of the defendant-in-error that the act in question prohibited only intoxicating beer, and, as the indictment (p. 1) failed to charge that the beer alleged to have been unlawfully made was in fact intoxicating, quashed the indictment (p. 5). The construction of the statute was alone considered by the court and is alone assigned by the Government as error (p. 6), although the defendant in and by its demurrer (pp. 2-5) also challenged the constitutionality of the enactment. As under the rule established by this court, only the particular question decided in the court below can be reviewed on this appeal (*United States* v. *Keitel*, 211 U. S. 370, 398; *United States* v. *Mason*, 213 U. S. 115, 122; *United States* v. *Portale*, 235 U. S. 27, 31), the discussion in this brief is confined to the question of interpretation.

STATEMENT.

The so-called prohibition rider to the Agricultural Appropriation Act of November 21, 1918, read as follows (40 Stat. 1046):

> "That after June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, for the purpose of conserving the man power of the Nation, and to increase efficiency in the production of arms, munitions, ships, food, and clothing for the Army and Navy, it shall be unlawful to sell for beverage purposes any distilled spirits, and during said time no distilled spirits held in bond shall be removed therefrom for beverage purposes except for export. After May first, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no grains, cereals, fruit, or other food product shall be used in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquor for beverage purposes. After June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no beer, wine, or other intoxicating malt or vinous liquor shall be sold for beverage purposes except for export. The Commissioner of Internal Revenue is hereby authorized and directed to prescribe rules and regulations, subject to the approval of the Secretary of the Treasury, in regard to the manufacture and sale of distilled spirits and removal of distilled spirits held in bond after June thirtieth, nineteen hundred and nineteen, until this Act shall cease to operate, for other than beverage purposes; also in regard to the manufacture, sale, and distribution of wine for sacramental, medicinal, or other than beverage uses. After the ap-

proval of this Act no distilled, malt, vinous, or other intoxicating liquors shall be imported into the United States during the continuance of the present war and period of demobilization: *Provided*, That this provision against importation shall not apply to shipments en route to the United States at the time of the passage of this Act.

"Any person who violates any of the foregoing provisions shall be punished by imprisonment not exceeding one year, or by fine not exceeding $1,000, or by both such imprisonment and fine: *Provided*, That the President of the United States be, and hereby is, authorized and empowered, at any time after the passage of this Act, to establish zones of such size as he may deem advisable about coal mines, munition factories, shipbuilding plants, and such other plants for war material as may seem to him to require such action whenever in his opinion the creation of such zones is necessary to, or advisable in, the proper prosecution of the war, and that he is hereby authorized and empowered to prohibit the sale, manufacture, or distribution of intoxicating liquors in such zones, and that any violation of the President's regulations in this regard shall be punished by imprisonment for not more than one year, or by fine of not more than $1,000, or by both such fine and imprisonment: *Provided further*, That nothing in this Act shall be construed to interfere with the power conferred upon the President by section fifteen of the food-control Act, approved August tenth, nineteen hundred and seventeen (Public Numbered Forty, Sixty-fifth Congress)."

The indictment found under this statute by the grand jurors at New Orleans charged that (p. 1)—

"The American Brewing Company, a corporation organized under the laws of the State of Louisiana, at New Orleans, in the New Orleans division of the Eastern District of Louisiana, on the 26th day of June, 1919, wilfully and knowingly did unlawfully use certain grains, cereals, and other food products, to wit, five hundred pounds (500 lbs.) of malt, one

hundred and ten pounds (110 lbs.) of hops, two thousand one hundred pounds (2,100 lbs.) of grits, and two hundred pounds (200 lbs.) of maltine, (the latter being sugar glucose), in the manufacture and production of a large quantity of beer, to wit, two hundred (200) barrels of beer, for beverage purposes, which said beer so manufactured and produced as aforesaid, then and there contained as much as one-half (½) of one per cent (1%) of alcohol by both weight and volume; the termination of demobilization not being then and there determined and proclaimed by the President of the United States; contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States."

It will be observed that this indictment charges nothing more than that in June of this year the defendant used food products in the manufacture of beer for beverage purposes and that this beer contained one-half of one per cent. of alcohol. It does not allege that beer with such an alcoholic content is intoxicating, and, of course, if that fact be material, it may not be presumed. The rule of criminal pleading is well settled that, if any essential element of the alleged crime is omitted in an indictment, such omission cannot be supplied by intendment or implication. *Pettibone* v. *United States*, 148 U. S. 197, 202; *United States* v. *Hess*, 124 U. S. 483, 486; *Todd* v. *United States*, 158 U. S. 278, 282. The averments that the defendant "did *unlawfully* use certain grains," etc., and that that was "contrary to the form of the statute in such case made and provided," etc., are mere conclusions of the pleader and not facts, and, therefore, are of no avail. *United States v. Cruikshank*, 92 U. S. 542, 558; *In re Greene*, 52 Fed, 104, 111; *United States* v. *Carney*, 228 Fed. 163, 165.

Since it is well-established law that where facts alleged

are susceptible of two interpretations, one of which points to guilt and the other to innocence, "a court of justice has no alternative; it must pronounce in favor of innocence" (*The Bothnea & The Jahnstoff*, 2 Wheat. 169, 177; *Coffin* v. *United States*, 156 U. S. 432), it follows that it must be presumed that the half per cent beer referred to in the indictment was non-intoxicating. Certainly the courts cannot judicially know what particular percentage of alcohol will render a given kind of beer intoxicating. Indeed, it would be far more reasonable to ask the court to take judicial cognizance of the indisputable fact that half of one per cent beer is not as matter of fact intoxicating.

I.

THE TRUE INTERPRETATION OF THE ACT OF CONGRESS OF NOVEMBER 21, 1918.

The question of statutory interpretation presented for adjudication under the act of Congress of November 21, 1918, is whether or not Congress, by use of the phrase "beer, wine, or other intoxicating malt or vinous liquor for beverage purposes," intended to include non-intoxicating beer and wine. On the one hand, the contention of the Government is that the words "beer" and "wine" must be interpreted without relation to what follows, as including all beer and wine whether intoxicating or not, and that they must be given effect as if they stood alone and were not immediately followed by the phrase "or other intoxicating malt or vinous liquor." The result of this interpretation necessarily would be that the word

"other" would be wholly disregarded and ignored, and the clause interpreted and enforced as if it read in each instance—

> "beer, wine, or . . . intoxicating malt or vinous liquor for beverage purposes."

On the other hand, the contention of the defendant-in-error is that the word "other" must, if possible, be given significance and effect, and that, as it may be accorded an apt and intelligible purpose, it cannot be ignored or disregarded.

Under the interpretation urged by the defendant-in-error, the word "other" serves a distinct purpose, namely, to carry back and apply the defining or qualifying term "intoxicating" to the immediately preceding antecedent words "beer" and "wine," and to mark them with the common quality thus indicated, thereby importing that each must be "intoxicating." In other words, the defendant-in-error contends that, according to a settled rule of statutory interpretation, effect must, if possible, be accorded to every word in a statute, that such a word as "other" cannot be treated as superfluous, void or insignificant, and that its use must be assumed, if possible, to indicate a definite purpose on the part of Congress. The rule is stated in *Market Co.* v. *Hoffman*, 101 U. S. 112, 115, by Mr. Justice Strong, speaking for the court, as follows:

> "We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented,

> no clause, sentence, or word shall be superfluous, void or insignificant.' This rule has been repeated innumerable times. Another rule equally recognized is that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each."

To same effect is *United States* v. *Lexington Mill Co.*, 232 U. S. 399, 410.

It must be manifest that no significance or effect whatever can be given to the word "other" in the statutory clause now before the court for interpretation except by holding that it indicates an intent on the part of Congress to affix the quality of "intoxicating" to the preceding words "beer" and "wine" and to require each of them to have that common quality as an essential element of the crime created by the statute.

If Congress had intended to prohibit beers and wines, whether intoxicating or not, it would clearly not have employed the word "other," and would have made the clause read:

> "beer, wine, or intoxicating malt or vinous liquor for beverage purposes."

But as Congress was dealing only with the subject of intoxicating liquors, it naturally qualified or defined the words "beer" and "wine" by connecting the defining word "intoxicating" with the two words immediately preceding, through and by the use of the relative adjective "other." Thus, instead of using the expression "intoxicating beer and wine or other intoxicating malt or vinous liquor," it adopted the simpler and equally expressive and comprehensive form "beer, wine, or *other intoxicating* malt or vinous liquor," although the briefer

mode of expressing such an intent might have been "all intoxicating malt or vinous liquor."

The mere fact that under this interpretation the words "beer" and "wine" do not serve any separate purpose that would not be comprehended within the phrase "intoxicating malt or vinous liquor" does not warrant the disregard of the word "other." The use of unnecessary words has long been quite common in statutes and even constitutions (*United States* v. *Bassett*, 2 Story 389, 404, 24 Fed. Cas. No. 14,539). In *United States* v. *Fisher*, 2 Cranch 358, 387, Chief Justice Marshall, discussing somewhat analogous phraseology, said:

> "On the phraseology of this act it has been observed, that there is a circuity of expression, which would not have been used if the intention of the legislature had been to establish its priority in all cases whatever. Instead of saying 'any revenue officer, or other person hereafter becoming indebted to the United States,' the natural mode of expressing such an intent would have been, 'any person indebted to the United States'; and hence it has been inferred that debtors of a particular description only were in the mind of the legislature.
>
> "It is true the mode of expression which has been suggested, is at least as appropriate as that which has been used; but between the two there is no difference of meaning, and it cannot be pretended that the natural sense of words is to be disregarded, because that which they import might have been better, or more directly expressed."

Whenever an expression is used which enumerates several things and concludes with a descriptive and comprehensive defining phrase containing the word "other" and embracing the remainder of the class, the tautology noted by Chief Justice Marshall occurs. Thus, the com-

mon statutory expression, in use by Congress for half a century, viz., "beer, lager beer, ale, porter or other fermented liquor," meant and means no more than the shorter expression "fermented liquor." But no one would seriously suggest that, in the illustration mentioned, the word "beer" should be held to be something other than a "fermented liquor," because, if a fermented liquor merely, the whole intention might have been more tersely expressed. "Nothing can be more mischievous than the attempt to wrest words from their proper and legal meaning, only because they are superfluous" (Lord Coleridge, C. J., in *Hough* v. *Windus*, L. R. 12 Q. B. D. 224, 229). The tautology in such expressions is common and inherent in the formula of speech which is employed, and it affords no warrant whatever for denying significance and effect to the word "other."

The construction urged by the defendant-in-error is supported by the decisions of this court and numerous other courts. *United States* v. *Chase*, 135 U. S. 255, 258, 259; *United States* v. *United Verde Copper Co.*, 196 U. S. 207, 213; *United States* v. *Loftis*, 12 Fed. 671, 673; *United States* v. *Clark*, 43 Fed. 574; *United States* v. *Wilson*, 58 Fed. 768, 770; *Potts* v. *United States*, 114 Fed. 52, 54; *Pacific Rolling Mill Co.* v. *Hamilton*, 61 Fed. 476, 477; *Gridley* v. *Northwestern Mut. L. Ins. Co.*, 14 Blatchf. 107, affirmed 100 U. S. 614; *Sinclair* v. *Phoenix Mut. L. Ins.*, 22 Fed. Cas. 195; *People* v. *Strickler*, 25 Cal. App. 60, 66, 142 Pac. 1121, 1123; *State* v. *Virgo*, 14 N. D. 293, 295; *Attorney-General* v. *Ayer*, 148 Mass. 584, 586; *Ex parte Gray*, 83 S. W. 828, 829 (Tex.); *Alexander* v. *Greenup*, 15 Va. (1 Munford) 134, 144; *City of St. Paul* v. *Traeger*,

25 Minn. 248, 253; *Minnesota Life Ins. Co.* v. *Link,* 230 Ill. 273, 278; *City of Bowling Green* v. *McMullen,* 122 S. W. 823, 825 (Ky.).

The case of *United States* v. *Chase,* 135 U. S. 255, directly rules the point of statutory interpretation that, in such a form of phrasing as is now presented for interpretation, the word "other" must be interpreted as urged by the defendant-in-error. In that case the court was called upon to interpret the act of Congress of July 12, 1876 (19 Stat. 90), which prohibited the use of mails for "every obscene, lewd, or lascivious book, pamphlet, picture, *paper, writing,* print or *other publication* of an indecent character." The indictment charged the sending of a *sealed* and addressed letter of an indecent character through the mails. Among the questions presented for decision was whether the words "or other publication" qualified and defined the preceding words "paper" and "writing" and marked each with the common quality of "publication" as an essential element of the crime, and thus excluded sealed private letters not in fact published. It was held that, according to a well-defined rule of construction, the words "other publication" related back and qualified or defined the words preceding them, and, consequently, that only "published papers" and "published writings" were within the statute. Mr. Justice Lamar delivering the unanimous opinion of the court, among other things, said (pp. 258, 259):

> "In the statute under consideration, the word 'writing' is used as one of a group or class of words, —book, pamphlet, picture, paper, writing, print,— each of which is ordinarily and *prima facie* understood to be a publication; and the enumeration con-

> cludes with the general phrase 'or other publication,' which applies to all the articles enumerated, and marks each with the common quality indicated.
>
> "It must, therefore, according to a well-defined rule of construction, be a published writing which is contemplated by the statute, and not a private letter, on the outside of which there is nothing but the name and address of the person to whom it is written."

The earlier case of *United States* v. *Loftis*, 12 Fed. 671, likewise arose under the act of Congress of July 12, 1876, and presented a question similar to that before this court in the *Chase* case. In a ruling to the same effect, District Judge Deady reasoned as follows (p. 673):

> "Speaking generally, this letter is a writing; but to bring it within this clause of the statute it must be also a 'publication.' This word 'writing' occurs in an enumeration of things—books, pamphlets, pictures, prints, and papers—which *ex vi termini* are *prima facie* publications.
>
> "The general phrase with which the enumeration ends, 'or other publication of an indecent character,' impliedly asserts that the things before enumerated are publications. The expression 'John and James and other men' is one in which, by a necessary implication, it is asserted that John and James are men."

After the *Chase* case had arisen, but prior to its decision by this court, the act of Congress of July 12, 1876, was amended by the act of September 26, 1888 (25 Stat. 496, c. 1039), so as expressly to insert the word "*letter*" in the list of prohibited publications and add the provision "*whether sealed as first-class matter or not.*" It was thereupon held that the statute as amended applied to the mailing of a private sealed letter. *Grimm* v. *United States*, 156 U. S. 604, and *Andrews* v. *United States*, 162

U. S. 420. Whilst in neither of these cases, nor in most of those decided in the district courts arising under the act of 1888, is any reference made to the phrase "*whether sealed as first-class matter or not*,"* such amendment could not, of course, have been disregarded, for it undoubtedly was made by Congress for the express purpose of changing the meaning as adjudged and of declaring that thereafter sealed as well as unsealed letters should be deemed included within the prohibition of the statute as amended.

In *United States* v. *United Verde Copper Co.*, 196 U. S. 207, the court interpreted a provision of the act of Congress of June 3, 1878 (20 Stat. 88, c. 150), permitting the use of timber on the public lands for "building, agricultural, mining and other domestic purposes," and it was called upon to decide whether the word "other" could be disregarded and the statute made to read as if that word had not been used; in other words, whether the adjective phrase "other domestic" qualified the preceding words. Mr. Justice McKenna delivering the opinion of the court among other things said (at p. 213):

> "Counsel for the Government recognizes this, and substitutes for 'domestic' the word 'household,' and contends that the word 'other' should be treated as an intruder and eliminated from the statute, and making the latter read that timber may be felled for 'building, agricultural, mining or *domestic* purposes.' But we are not permitted to take such liberty with the statute, if 'domestic' has a meaning consistent with the intentional use of the word 'other.' It has such meaning. It may relate, it is true, to the household. But, keeping its idea of locality, it may relate to a broader entity than the household. We may

* See, however, *United States* v. *Nathan*, 61 Fed. 936, at p. 937.

> properly and accurately speak of domestic manufactures, meaning not those of the household, but those of a county, state or nation, according to the object in contemplation. So in the statute the word 'domestic' applies to the locality to which the statute is directed, and gives permission to the industries there practised to use the public timber. This definition of 'domestic' gives the word an apt and sensible meaning, and we must regard the association of the word 'other' with it as designed, not as accidental."

It is evident that this court then interpreted the word "other" in the act of 1878 as designedly used to connect the defining term "domestic" with the preceding words, including the word "mining," and that it held that, so interpreted, the intent of the statute was to authorize the use of timber for the purpose of "domestic mining." The syllabus of the report states the substance of the decision as follows:

> "An apt and sensible meaning must be given to words as they are used in a statute and the association of words must be regarded as designed and not as accidental, nor will a word be considered an intruder if the statute can be construed reasonably without eliminating that word."

In *Potts* v. *United States*, 114 Fed. 52, the Circuit Court of Appeals for the Ninth Circuit had before it for interpretation the act of Congress (23 Stat. 321), providing "that no person, by force, threats, intimidations, or by any fencing or inclosing, *or any other unlawful means*, shall prevent or obstruct" any person from peaceably entering upon or establishing a settlement upon public lands. Speaking for the court, Circuit Judge Morrow used the following language (at p. 54):

> "By a well-known rule of construction the words 'or any other unlawful means,' in describing and

> giving scope to the prohibited acts, relate back to and qualify the preceding words 'fencing' and 'inclosing,' so that those words must be read as 'unlawful fencing' and 'unlawful inclosing.' "

In *Gridley* v. *Northwestern Mutual Life Ins. Co.*, 14 Blatchf. 107, 108, affirmed 100 U. S. 614, an insured was asked the question: "Have [your] parents, uncles, aunts, brothers or sisters been afflicted with consumption, . . . insanity, . . . or any *other hereditary* disease?" to which he replied: "No hereditary taint of any kind in family." The company claimed that an uncle of the insured had had insanity, but failed to prove that the insanity was hereditary. The court ruled that the defense was insufficient on that account; in other words, it was held that the word "other" in the phrase "or any *other* hereditary disease" carried back the term "hereditary" and thereby qualified each of the preceding nouns, District Judge Benedict saying:

> "It may be that the diseases enumerated in the question are not in all cases hereditary, but all of them sometimes take the form of hereditary diseases; and the word 'other' to my mind, plainly indicates that the question was intended to be an inquiry whether any of the diseases mentioned had appeared among the relatives of the applicant in the form of an hereditary disease."

This court affirmed the above interpretation and held that it was necessary to show, not only that the alleged insanity of the uncle had existed, but that it was hereditary. See also to the same effect, *Sinclair* v. *Phœnix Mut. L. Ins. Co.*, 22 Fed. Cas. 195.

It is, therefore, submitted that it is proper to assume that when Congress used the phrase "beer, wine, or *other*

intoxicating malt or vinous liquor," it knew that, according to a well-defined rule of construction, the words "other intoxicating" would operate to mark the words "beer" and "wine" with the common quality of being "intoxicating"; and it must reasonably follow that such is the intention to be attributed to the lawmakers.

There are adjudications in the state courts to the same effect. In *City of Bowling Green* v. *McMullen*, 122 S. W. 823, 825, the Court of Appeals of Kentucky declared that a non-intoxicating malt liquor did not come within the meaning of a statute relating to "spirituous, vinous, malt or other intoxicating liquors." In *State* v. *Virgo*, 14 N. Dak. 293, 295, it was held that an act covering "all spirituous, malt, vinous, fermented or other intoxicating liquors," affected only liquors which were actually intoxicating and no others. And in *People* v. *Strickler*, 142 Pac. 1121, 1123 (Cal.), it was adjudged, in respect of a statute providing that "the term alcoholic liquors. . . shall include spirituous, vinous and malt liquors, and any other liquor or mixture of liquors which contains 1 per cent. by volume, or more, of alcohol," that the final words, "any other liquor or mixture of liquors which contains 1 per cent. by volume, or more, of alcohol," related back to and qualified the particular words preceding them, so that no malt liquor with less than one per cent. of alcohol came within the prohibition, the court refusing to approve the argument that "by the specific enumeration in said section of spirituous, vinous and malt liquors, the legislature intended such liquors to fall under its ban regardless of whether they do or do not contain alcohol."

In a number of the authorities ordinarily cited in oppo-

sition to these views, the result is to be explained by difference in language or the history of the legislation. Thus, in the case of *United States* v. *Cohn*, 2 Ind. Ter. 474, 52 S. W. 38, it was the legislative history of the enactment that was determinative. In the prior statute "ale and beer" had been absolutely prohibited, and, as the court observed, it was the evident intent of the subsequent revision "to include in the new law that which was excluded by the old," not to omit what was included in the old. It should, furthermore, be noted that the decision was by a divided court, and that neither counsel nor the judges cited the *Chase* case or, so far as appears, even knew of it.

Moreover, the double disjunctive in the statute in the *Cohn* case—"vinous, malt *or* fermented liquors, *or* any other intoxicating drinks"—prevented that compactness of expression and unity of thought which are to be found in the statute now before the court. This is likewise true of the statute in *Fuller* v. *City of Jackson*, 97 Miss. 237, where the use of several disjunctives operated to break the sentence up into distinct and independent parts covering distinct classes of liquors.

In the case of *La Follette* v. *Murray*, 81 Oh. St. 474, the legislative history, and not the usual meaning of the statutory language involved, was the *ratio decidendi*. The statute there laid a tax "upon the business of trafficking in spirituous, vinous, malt or other intoxicating liquors." In the prior act the word "any" had stood where the word "other" now was. The court held, upon consideration of the legislative history of the law, that the legislature had intended no change in effect by sub-

stituting "other" for "any." Similar considerations are applicable to *Marks* v. *The State*, 159 Ala. 71, 48 So. 864, and *State* v. *Ely*, 22 S. Dak. 487.

The *Marks* case, moreover, involved, a statute quite different in important particulars from the one here under discussion. It prohibited the sale of "alcoholic, spirituous, vinous *or* malt liquors, intoxicating bitters *or* beverages *or other* liquors or beverages by whatsoever name called, which if drunk to excess will produce intoxication." It will be observed that no qualifying or defining adjective is placed between the word "other" and the word "liquors" in this act as in the act of November 21, 1918, and that the form of the clause is not a compact unity, but is broken into several independent parts by the repeated use of the disjunctive "or." The word "other" is not defined or qualified, but is used in the sense of additional, and an apt and sensible meaning is accorded to it by recognizing that the preceding enumerated substances are "liquors or beverages," and it was not, therefore, necessary to hold that the phrase, "which if drunk to excess will produce intoxication," following the words "liquors or beverages," modified any terms but those nearest to them. In the act of November 21, 1918, however, the adjective "other" immediately adjoins the word "intoxicating" and both therefore necessarily relate back to the preceding words as qualifying them, and, if the word "other" is to have any effect or significance, it must serve to connect the defining or qualifying word "intoxicating" with the preceding words "beer" and "wine." The interpretation of such a statute as that involved in the *Marks* case furnishes no precedent for

the present case. A similar distinction applies to the cases of *Fuller* v. *City of Jackson*, 97 Miss. 237, 253; *Extract & Tonic Co.* v. *Lynch*, 100 Miss. 650, and *in re Lockman*, 18 Idaho 465.*

In *Brown* v. *State*, 17 Ariz. 314, the statute related to "ardent spirits, ale, beer, wine, or intoxicating liquor of any kind." The word "other" was not employed. Manifestly that decision has no bearing at all upon the question now presented. The same is true of *Pennell* v. *State*, 141 Wis. 35, 123 N. W. 115, and *Leisy Brewing Co.* v. *Atchison &c. R. Co.*, 225 Fed. 753.

The detailed consideration of the opinions heretofore delivered in the lower federal courts construing the act of Congress of November 21, 1918, is postponed (see pp. 46-62), but it may be stated here that District Judge Augustus N. Hand was clearly right when, in the first of these cases—*Jacob Hoffmann Brewing Co.* v. *McElligott*, 259 Fed. 321, 337,—he sustained the contentions now urged by the defendant-in-error and announced the following conclusion after a thorough consideration of the subject:

> "If the rule of *noscitur a sociis* is ever to be employed as a canon of construction, it is applicable in the present case, where the close relation of the qualifying word and the compactness of the whole clause render the interpretation I have given almost inevitable. In no clause where the relation of the

* In this case the statute covered "spirituous, vinous, malt and fermented liquors, and all mixtures and preparations thereof, *including* bitters and other drinks that may be used as a beverage and produce intoxication." The use of the word "including" before "other drinks," etc., indicated that the clause immediately following that word was not used for the purpose of limiting or modifying what preceded it, but rather to add to the classes of beverages to be affected by the statute.

> word 'intoxicating' is as close as here, both spacially and grammatically, has a decision been reported prohibiting non-intoxicating malt liquors.
>
> "I think it can be fairly said that the general rules of construction enunciated by the United States courts bear out the interpretation of the statute which I have arrived at. The results which the state courts have reached in interpreting their liquor laws have been most divergent, but their decisions furnish abundant authority for the construction I have adopted, and the reasons for it appearing in the act itself seem to me most convincing."

In these views he was emphatically sustained by all the Circuit Judges in the Circuit Court of Appeals. Thus Circuit Judge Ward said (259 Fed. at p. 529):

> "We concur in the construction of the statute by the court below."

Circuit Judge Hough declared the interpretation urged by the Government to be a "strained construction" (*id.* at p. 542), and Circuit Judge Rogers said (*id.* at p. 541):

> "I am unable to see any escape from the conclusion that Congress in enacting the law had in mind intoxicating liquors. In that conclusion I agree with my associates."

II.

The plain intent of the act of Congress of November 21, 1918, as disclosed in the act itself and in similar statutes.

Aside from the grammatical and legal import of the words of the clause in question when read in the light of settled rules of statutory interpretation and current use of language, the declared purpose of the enactment as a war measure and the context of the words in question

furnish evidence that it was the intention of Congress to prohibit only actually intoxicating liquors by the so-called "prohibition rider" annexed to the Agricultural Appropriation Bill which became the act of November 21, 1918. The title of the act affords no aid. It reads (40 Stat. 1045):

> "An act to enable the Secretary of Agriculture to carry out, during the fiscal year ending June thirtieth, nineteen hundred and nineteen, the purposes of the Act entitled 'An Act to provide further for the national security and defense by stimulating agriculture and facilitating the distribution of agricultural products,' and for other purposes."

The prime object of the rider and the only purpose declared in its text are stated as follows:

> "for the purpose of conserving the man power of the Nation, and to increase efficiency in the production of arms, munitions, ships, food, and clothing for the Army and Navy."

The conservation of food products was already fully covered by the act of August 10, 1917, and the presidential proclamations of December 8, 1917, and September 16, 1918, issued thereunder, all then still in full force and effect.

It must be evident that whilst the conservation of manpower or increase of efficiency in production of supplies for the army and navy might be directly promoted by prohibiting the manufacture and sale of intoxicating liquors, such conservation would not be promoted or efficiency in production increased by prohibiting non-intoxicating liquors. Undoubtedly it was appreciated by Congress, as stated by District Judge Augustus N. Hand in *Jacob Hoffmann Brewing Co.* v. *McElligott,* 259 Fed. at pp.

332-3, that the great increase of production of grains and other food products which had occurred by the autumn of 1918 would induce or compel the President to relax the ban placed thereon by him under the act of August 10, 1917, and it is probable that Congress intended that, no matter how abundant the supply of food products might be or become, the manufacture and sale of intoxicating beverages should, nevertheless, be prohibited.

Let us now analyze the enactment itself. Its first prohibition is that "it shall be unlawful to sell for beverage purposes any *distilled spirits*, and during said time no *distilled spirits* held in bond shall be removed therefrom for beverage purposes except for export." The expression employed is "distilled spirits," not "intoxicating distilled spirits," and the reason is manifestly because there are no non-intoxicating distilled spirits. The first prohibition of the statute is, therefore, directed against intoxicants solely and exclusively.

Then follow the two prohibitions under consideration herein, and they are limited to "beer, wine, or other intoxicating malt or vinous liquor for beverage purposes." The compactness of form of this clause indicates that it was intended to define and bring together within its scope but a single class with common qualifications, and the thought expressed is not in any wise divided or interrupted so as to raise several and distinct classes of liquors. The very last words of the phrase, "for beverage purposes," indisputably relate back to the beginning of the clause and define and modify both of the words "beer" and "wine," as well as the intermediate expression "other intoxicating malt or vinous liquor," to which

they are immediately adjoined. This is but in accordance with a well-settled rule of construction aptly expressed by Lord Bramwell in *Great Western Railway Co.* v. Swindon & Cheltenham Railway Co., L. R. 9 App. Cas. 787, 808, as follows:

> "As a matter of ordinary construction, where several words are followed by a general expression as here, which is as much applicable to the first and other words as to the last, that expression is not limited to the last, but applies to all."

There is, therefore, in this phrase "for beverage purposes" a compulsion upon the mind of the reader to turn back and regard it as relating to and defining all the words of the clause. It was quite evidently not intended to interfere with beer or wine for medicinal or sacramental purposes or for any other than "beverage purposes." Indeed, the statute expressly provides as follows:

> "The Commissioner of Internal Revenue is hereby authorized and directed to prescribe rules and regulations, subject to the approval of the Secretary of the Treasury. . . in regard to the manufacture, sale, or distribution of wine for sacramental, medicinal, or other than beverage uses."

And this compulsion upon the mind in respect to the reaching back and qualifying effect of the words "for beverage purposes" is emphasized by the intermediate expression "or other intoxicating malt or vinous liquor" which immediately follows the words "beer, wine." The word "other" necessarily connects and binds into even closer relation the words which precede and follow it than does the terminal expression "for beverage purposes" which we have just noticed. To repeat, unless intoxicating beer and intoxicating wine are intended, the word

"other" becomes useless and meaningless in this clause, as we have seen, and the entire expression becomes the equivalent of the clause "beer, wine, or intoxicating malt or vinous liquor," a combination of words which is not employed anywhere in the act, which is wholly different in meaning and effect, and which, in a word, was not enacted.

If not only intoxicating beer, but all beer was intended to be banned, as the Government now asserts, then it is plain that the indictment in the case at bar should have unqualifiedly alleged that the defendant had made "beer." But the Government realized that, in truth, all beer could not have been intended to be prohibited by Congress. Clearly spruce beer, root beer, ginger beer, weiss beer and numerous other well-known non-intoxicants called "beer," were never meant to be prohibited. The argument is, however, that, not these beers, but only *malt* beer was in the mind of Congress. If that be so, it can only result because of the defining and limiting effect of the phrase "other intoxicating *malt* or vinous liquor"; and, manifestly, if the word "malt" in this phrase relates back and qualifies the word "beer," the adjoining word "intoxicating" in the same phrase must likewise relate back and qualify the same antecedent.

The clause in the statute which follows the prohibitions just discussed deals solely with "distilled spirits," and, therefore, only with intoxicating liquors.

The succeeding clause reads as follows:

> "After the approval of this act no distilled, malt, vinous, or other intoxicating liquors shall be imported into the United States during the continuance of the present war and period of demobilization."

It is evident that this was intended to be the counterpart of the prior prohibitions which were aimed at "distilled spirits" and "beer, wine, or other intoxicating malt or vinous liquor." If the Government's method of construing this statute were correct, then since November 21, 1918, it has been and is now illegal to import into the United States *any* malt or vinous liquor that is non-intoxicating. But it is submitted that this view of the statute probably occurred to no officer of the Government before the present controversy arose. Neither the conservation of food or of man-power, nor efficiency in production, could reasonably warrant the prohibition of the importation of non-intoxicating malt or vinous liquors.

It is noteworthy that this clause prohibiting the importation of "distilled, malt, vinous, or other intoxicating liquors," affords another illustration of the use of unnecessary words by Congress. The phrase quoted could, of course, have been more briefly expressed by the words "intoxicating liquors," but Congress saw fit to employ a common formula of speech which inherently involves some surplusage. Its plain intent is, however, not to be frustrated on that account.

If it be said that this clause as to importations is different in construction and effect from the preceding clause and that Congress intended to prohibit the importation of intoxicating liquors only, the conclusion would be that Congress intended to permit the importation of non-intoxicating beer or wine whilst prohibiting the manufacture and sale thereof in the United States. Is it not unreasonable to assume that Congress had any such intention, and is it not far more reasonable to conclude that in

both cases it was dealing with and prohibiting intoxicating liquors only?

The next clause relating to prohibition is the one empowering the President—

> "To establish zones of such size as he may deem advisable about coal mines, munition factories, shipbuilding plants, and such other plants for war material as may seem to him to require such action whenever in his opinion the creation of such zones is necessary to, or advisable in, the proper prosecution of the war, and . . . he is hereby authorized and empowered to prohibit the sale, manufacture, or distribution of *intoxicating liquor* in such zones."

Only "intoxicating liquor" is here mentioned, and this, too, at the very point where it was of the highest importance to the conduct of the war that the production, sale, or distribution of beverages that might be at all harmful should be prohibited to the utmost degree. *According to the contention of the Government, Congress intended that within these vital zones non-intoxicating malt and vinous beverages could be freely produced, sold and distributed, and, of course, sold and distributed to the miners, munition workers, ship-builders, etc., who were within these zones; but that in every other place in the United States, however remote from these zones, non-intoxicating beer, even of a kind which the President has in terms declared to be "nutritious and palatable," could not be made and sold at all!*

If in such zones all beverages, regardless of alcoholic content, had been prohibited, while outside only intoxicating beverages had been forbidden, the differentiation would have been within reason. But the conclusion to which the contention of the Government leads would be

plainly unreasonable and makes manifest that the truth is that the statute throughout all its prohibitions only intended to reach and condemn intoxicating beverages, and hence consistently dealt in all its parts solely with intoxicating liquors.

It was urged by the Government in the New York cases that the differences between the clauses of the act relating to importation and zone districts on the one hand, and those relating to the manufacture and sale of beverages on the other hand, were natural and necessary because the former would go into effect immediately while the latter only in May and July thereafter. But the explanation is not persuasive. If the prohibition of non-intoxicating beverages was deemed necessary in the prosecution of the war in order to conserve man-power and increase efficiency in the production of arms, ships and munitions, then, obviously, such beverages could not be kept out of the country too soon, nor withheld too early from the reach of those working or serving within the war production zones. District Judge Hand has refuted this argument in the following passage of his opinion in the *Hoffmann* case (259 Fed. at p. 332):

> "Is it likely that Congress would fail to empower the President to prohibit all beer of every kind in these important zones, if it had thought it necessary in the earlier provisions of the act to prevent subterfuge by excluding non-intoxicating beer? If the total prohibition of non-intoxicating malt liquors was essential after June 30th, it apparently was more vital in the interval between. Indeed, peace might be concluded and the army demobilized before any result would ensue which might be obtained by such an indirect aid in the suppression of alcoholic drinks as the prohibition of non-intoxicating liquors.

> "It is to be remembered that when the act was passed there was a presidential proclamation in existence prohibiting brewing of malt liquors; that thereafter the President, by reason of the abundance of grain, relaxed this restriction and limited it to non-intoxicating liquors. Is it likely, in view of these circumstances, that Congress did exactly the opposite, and started with a law more liberal than the proclamation in force, and ended, after much of the need of conservation would be likely to have lessened, with an absolute prohibition of non-intoxicating beer, while the President issued proclamations of an opposite character? Both in the acts and in the proclamations of the President, when there is intended to be prohibition of any beverage, the words are clear and unmistakable."

The final clause of the enactment is the following proviso:

> "*Provided further*, that nothing in this Act shall be construed to interfere with the power conferred upon the President by section fifteen of the Food-Control Act, approved August tenth, nineteen hundred and seventeen."

This proviso clearly indicates the intention of Congress to interfere as little as possible with the President's power to regulate beverages for the purpose of food conservation under the act of August 10, 1917. The President has by his proclamations dated January 30 and March 4, 1919, and still in force, permitted "the manufacture of beverages which are not intoxicating." It must, therefore, be manifest that to construe the act of November 21, 1918, as wholly prohibiting the use of food products in the manufacture of non-intoxicating beverages (with certain unimportant exceptions) would be "to interfere with the power conferred upon the President by section fifteen of the Food Control Act" to the largest

possible extent and, therefore, in direct contravention of the declared purpose of the proviso.

The construction urged herein is not only according to the natural import of the language used and the subject-matter being dealt with by Congress, but it avoids the unjust discrimination between non-intoxicating beverages which must otherwise ensue. *Hawaii* v. *Mankichi*, 190 U. S. 197, 214. Under the contention of the Government any non-intoxicating malt or vinous liquor, so long as it is not a beer or a wine, would be unprohibited, including non-intoxicating ale, porter and stout, whilst non-intoxicating beer and wine would be forbidden. Such a construction of the law would create want of uniformity, as well as a discrimination which finds no justification either in the purpose to conserve food or in the purpose to foster efficiency in conducting the war. As District Judge Hand pointed out (259 Fed. at pp. 332-3):

> "The prime object [of the rider in the act of November 21, 1918] was not to prevent unnecessary consumption of grain, which was already guarded against by the act of August 10, 1917, but to increase the production of all things, including grain, which might contribute to national efficiency by prohibiting intoxicants. Congress evidently feared that the prohibition of intoxicating liquors, which was sought to be covered by the act of August 10, 1917, and the presidential proclamations in relation thereto, might be relaxed by the President if he should come to feel that as a measure to conserve grain a drastic inhibition of the use of it for brewing could not logically be longer defended. Under these circumstances, Congress, as I think, passed an act by virtue of its war power preventing after about six months the manufacture or sale of intoxicating liquors, in order 'to increase efficiency . . . in production' irrespective of whether or not there should be any need

> of unusual abstention in the use of grain already produced. Any other interpretation of the act, not only does violence to the natural meaning of the words, but is utterly inconsistent with the fact that malt liquors, such as ale, stout, and porter, are by no possibility prohibited unless they are intoxicating. To single out non-intoxicating beer for prohibition, and leave non-intoxicating ale, stout, and porter to be manufactured and sold, would involve a construction of the act too unreasonable to be entertained."

Had Congress contemplated that the determining characteristic of the prohibited liquor should not be its intoxicating quality but merely whether it was a "beer," and that grain would be equally wasted whether such beer contained much or little alcohol, then *all* malt liquors and not beer merely, would have been prohibited. But Congress expressly provided the contrary: it forbade only "*intoxicating* malt liquors." If, as a prohibition statute to conserve man-power, Congress conceived that it was just as necessary to forbid beverages of small alcoholic content as beverages of large alcoholic content, then, too, the statute would have forbidden *all* malt and vinous liquors, in addition to beer and wine, and not saved as harmless all other non-intoxicating malt and vinous beverages. And, finally, if for the practical enforcement of the law it was necessary to bar *all* subterfuges, then again the enactment failed to accomplish that purpose, for it does not, as did the statute involved in *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 204, prohibit *all* malt liquors, but only such of them as are intoxicating.

It should also be pointed out that the cases which, like the *Purity Extract Co.* case, have sustained laws forbidding non-intoxicants along with intoxicants, dealt with

statutes whose terms were plainly and unambiguously expressed and clearly directed towards that end, and not with language so ill-suited to that purpose as that here under consideration. The prohibition was not left to implication or ambiguous phrasing. As Judge Hand declared in the *Hoffmann Brewing Co.* case (259 Fed. at p. 331):

> "Such a suppression of a drink confessedly harmless in itself cannot be implied from general language prohibiting intoxicating liquors."

Moreover, whenever Congress has intended any such drastic prohibitory and sweeping result, it has always employed words which placed the matter beyond all doubt. Thus, in legislating for Alaska (act of Feb. 14, 1917, ch. 53, 39 Stat. 903), Congress provided that—

> "Whenever the term 'liquor,' 'intoxicating liquor' or 'intoxicating liquors' is used in this act it shall be deemed to include whisky, brandy, rum, gin, wine, ale, porter, beer, cordials, hard or fermented cider, alcoholic bitters, ethyl alcohol, and *all malt liquors*," etc.

And in legislating for the District of Columbia (act of Mar. 3, 1917, ch. 165, 39 Stat. 1123) it provided that—

> "Whenever the term 'alcoholic liquors' is used in this act it shall be deemed to include whisky, rum, gin, wine, ale, porter, beer, cordials, hard or fermented cider, alcoholic bitters, ethyl alcohol, *all malt liquors*, and all other alcoholic liquors."

If, therefore, Congress had intended that any peculiar, strained, or artificial meaning should be given the words used in the act of November 21, 1918, it would certainly have defined them accordingly. Indeed, an extreme bill (H. R. 14,915) was in fact introduced into the 65th Congress "to define intoxicating liquors" where that term

was employed in federal legislation, as including "all liquors containing alcohol in any degree whatsoever," *but it was not enacted.*

A perusal of the Congressional legislation on this subject will further disclose that, although Congress when legislating for a particular locality may, out of consideration for local conditions* (like those affecting the Indians), adopt more stringent rules, yet when it legislates generally for the whole country its public policy, as disclosed in and by its enactments, deals prohibitively with intoxicants solely. Recourse to this legislation *in pari materia* as an aid to construction is, of course, permissible. *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 306, 309; *Lawrence v. Allen*, 7 How. 785, 793; *Smith* v. *People*, 47 N. Y. 330, 339; *State* v. *Gerhardt*, 145 Ind. 439; *Rohrer* v. *Hastings Brewing Co.*, 83 Neb. 111, 116; *Palmers' Case* (1784), 1 Leach C. C. (4th ed.) 352, 355. Thus, the Selective Service Law (act of May 18, 1917, ch. 15, 40 Stat. 76) forbade any person to "sell, supply, or have in his possession any intoxicating or spirituous liquors at any military station, cantonment, camp," etc.; empowered the Secretary of War to make regulations for "the sale and use of intoxicating liquors for medicinal purposes," and declared it unlawful "to sell any intoxicating liquor" to any soldier in uniform. The Food Control Law (act of August 10, 1917, ch. 53, 41 Stat. 2761), which is specifically referred to in the proviso of the act of November 21, 1918, and is clearly *in pari materia*

* E. g., section 15 of the act of August 10, 1917, permits the President to license the production of vinous and malt liquors in general, but the proviso thereto excepts from this power any right so to do in a locality "where the manufacture of such vinous or malt liquor is prohibited."

therewith, is an act for the conservation of productive efficiency, as well as a food conservation act, and contains contrasting provisions with regard to intoxicating and non-intoxicating liquors. It forbids absolutely the use of food materials for the production of distilled spirits for beverage purposes, and it forbids absolutely the importation of any distilled spirits. As stated above, all distilled spirits are intoxicating. The statute deals quite differently, however, with malt or vinous liquors for beverage purposes. As these may not be intoxicating, the right to regulate and limit the use of food stuffs in their production is entrusted to the President to deal with as circumstances may dictate. And his proclamations under this act have carefully distinguished between intoxicants and non-intoxicants.

His first proclamation of December 8th, 1917, permitted the use of food materials in the manufacture of beer containing not to exceed 2.75 per cent. of alcohol by weight, and brought into being and general use the so-called "war-beer" or non-intoxicating beer which is involved in other cases now before the court. It cannot be reasonably doubted that the President, in fixing this standard, acted with circumspection and upon due advice of competent experts. His last two proclamations, dated respectively January 30 and March 4, 1919, and promulgated after the passage of the act of November 21, 1918, have construed that enactment as it is construed herein, and, accordingly, in deference to its policy, the President permitted brewers to use all kinds of food products in any quantities for the manufacture of *non-intoxicating* beverages, there being now, as the President has found and pro-

claimed, an abundance of all food materials. These proclamations are printed in full in the appendix to this brief.

Finally, as to the general public policy of Congress, it should be recalled that the Eighteenth Amendment to the Constitution proposed by the same Congress in December, 1917, is expressly limited to "intoxicating liquors."*

The consistency and uniformity with which the Congress and the President, and now the legislatures of the various states in ratifying the Eighteenth Amendment, have joined in distinguishing, for all purposes of prohibition in federal laws, between intoxicating and non-intoxicating beverages, is most significant and persuasive. The attempt of the Government to spell out of the language of the act of November 21, 1918, a departure from this public policy and a condemnation of a lawful business, declared by the President to be desirable, by forcing upon the plain terms of the statute a strained and artificial meaning and a forced implication, violates every rule of construction. Certainly crimes ought not to be raised and otherwise lawful business be struck down and destroyed without any compensation whatever, except under the compulsion of the plainest and most unmistakable statutory language. No such language is to be found in the statute now before the court for construction.

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* See also Acts of May 23, 1918, ch. 84 (41 Stat. 560), May 25, 1918, ch. 86 (41 Stat. 561), and July 1, 1918, ch. 113 (41 Stat. 634, 665), and Joint Resolution of September 12, 1918, ch. 170 (41 Stat. 958).

III.

THE INTENT OF THE ACT OF CONGRESS OF NOVEMBER 21, 1918, AS DISCLOSED BY ITS LEGISLATIVE HISTORY.

The legislation resulting in the act of November 21, 1918, was primarily and principally an Agricultural Appropriation Bill. As originally drafted, it contained no provisions whatever concerning the prohibition of intoxicating liquors; but thereafter the so-called prohibition rider was tacked on to it. This rider was debated and framed and took its final form before the Armistice of November 11, 1918, was signed, and it was never debated or amended thereafter. It was drafted while the war was flagrant, and would probably have been enacted long before November 21, 1918, had it not been but a small part of an appropriation act whose other provisions engaged the attention of Congress for a considerable period. It was passed on November 21, 1918, notwithstanding the Armistice, because it was part of a bill providing appropriations necessary to the Government. Its legislative history, which may properly be referred to in order to shed light upon the intent of Congress (*Blake* v. *National Banks*, 23 Wall. 307, 319), strongly supports the construction hereinbefore urged.

Thus, on May 21, 1918, the subject covered by the rider was first brought before the House of Representatives by an amendment offered by Mr. Randall (Cong. Rec. p. 7400). This amendment had two purposes: (1) to make it "unlawful during the existence of the war with Germany to use any food or food materials in the manufacture or preparation of *alcoholic* beverages," and (2) to deny to

the administrative officers of the Government any part of the appropriation for agricultural purposes made in the act until the President had under the act of August 10, 1917, proclaimed an absolute prohibition against the use of foodstuffs "in the production of malt or vinous liquors for beverage purposes" (Cong. Rec. p. 7402). The debate on this amendment shows that it was intended by its sponsors to cover both intoxicating and non-intoxicating liquors (Cong. Rec. p. 7403). In the Senate the Jones amendment was substituted for this one, but its prohibitions were also directed against non-intoxicants. It expressly covered "malt or vinous liquors for beverage purposes" (Cong. Rec. p. 8191).

But neither of these forms was enacted. The so-called Sheppard amendment succeeded them, and was finally adopted, plainly because Congress would not agree that all malt liquors, whether intoxicating or not, should be banned by its direct legislative act or that the President should be coerced into proclaiming a prohibition against all such beverages in violation of his better judgment. Towards that specific end Congress used the language "beer, wine, or other *intoxicating* malt or vinous liquor," and inserted the proviso already quoted, to the effect that nothing should interfere with the powers of the President under the act of August 10, 1917 (Cong. Rec. p. 10,475). The following extracts from the Congressional Record are typical of the debate upon the subject held on May 21 and July 10, 1918 (Cong. Rec. pp. 7403, 9702):

> Rep. Overmeyer: "Will the gentleman state whether or not cereals are used in the manufacture of non-intoxicating liquors such as Bevo and Pablo?" . . . .

Rep. Caraway: "I understand they are."

Rep. Obermeyer: Does the gentleman's amendment prohibit the manufacture of those things?"

Rep. Caraway: "Yes, anything in which any food products are used in the making or brewing of its products. I do not believe in these times of shortage of grain that people should be permitted to make millions of gallons of Bevo." . . . .

Rep. Stafford: "This amendment can be considered only in one attitude and that is, a direct reflection and criticism of the President of the United States in the administration of authority that was granted to him as to the control of food in the manufacture of maltous beverages. The President has control of that situation in a practical way. He has reduced the amount of alcoholic content that may be utilized in beer or near-beer, and now it rests with the gentleman from California, who, I assume, pretends to be a friend of the administration, to come here and direct a slap at the President in his administration of this most troublesome question. . . .

"This is a reflection, a direct reflection, upon the President. . . . I am perfectly content to leave this great problem in the hands of the President. He has solved it in a practical way. The country is not complaining of his solution of it. He has reduced the amount of alcoholic content that may be used in the manufacture of beer now to 2½ per cent., I believe. In Canada they regard beer containing only 2½ per cent. of alcohol as a temperance beverage. And throughout the country we have the like maltous beverage containing 2½ per cent. or less of alcohol, but now as a fetish the few would put aside the practical solution and create dissension among industrial workers by refusing them their light beer. The alternative of their proposal is to favor whisky and bar beer." . . . .

Sen. Reed: "So, Mr. President, at the present time, by the express act of Congress, and as a part of the war legislation, the President of the United States is vested with plenary power to immediately prohibit, if he deems it for the public welfare, or in

> the interest of the prosecution of this war, the manufacture or sale of a single additional particle of liquor of any kind. . . . In other words, a moderate and temperate and wise discretion ought to be used. We vested that power in the President. He has reduced the alcoholic content of those liquors. He has proceeded along a line which has made for temperance. He has the power under the law as it stands to-day to absolutely prohibit; and I say that the wise thing to do is not to endeavor to force his hand, is not to endeavor to coerce and compel him. The wise thing to do is to trust the President upon this matter."

The subsequent proceedings in the same Congress also disclose that it intended the act of November 21, 1918, to deal with intoxicating liquors only. Thus, under date of February 26, 1919, the Judiciary Committee of the House of Representatives submitted a report* (No. 1143) in respect of a bill expressly for the purpose of providing machinery for the enforcement of the act of November 21, 1918, in which it described that act in the following language (pp. 2-3):

> "As part of the so-called food-stimulation act, approved November 21, 1918, the Congress adopted legislation prohibiting the manufacture and sale, after June 30, 1919, of *intoxicating liquors* for beverage purposes. . . . It simply prescribes a penalty for the manufacture and sale of *intoxicating liquors* for beverage purposes."

And although the committee in discussing this enactment repeatedly referred to it as dealing with intoxicants, it nowhere even once suggested that the statute related to any non-intoxicants whatever.

* A congressional report upon proposed legislation may be referred to by the courts as an aid in determining the proper construction of a statute. *Caminetti* v. *United States*, 242 U. S. 470, 490; *United States* v. *St. Paul, M. & M. Ry. Co.*, 247 U. S. 310, 318.

At the extra session of the 66th Congress the committee again reported to the House of Representatives (Rep. No. 91, June 30, 1919) in reference to the act of November 21, 1918, and again characterized it as dealing with intoxicating liquors, and did not even suggest that the act affected non-intoxicating beverages of any kind.

Subsequently and on October 28, 1919, Congress enacted over the President's veto title I of the so-called National Prohibition Act which in terms purported "to provide for the enforcement of war prohibition," and in section 1 declared that—

> "The words 'beer, wine, or other intoxicating malt or vinous liquors' in the War Prohibition Act [i.e., the act of November 21, 1918] shall be *hereafter* construed to mean any such beverages which contain one-half of 1 per centum or more of alcohol by volume."

Manifestly this amendment recognized that theretofore the words, thus legislatively redefined for the future alone, had had a different meaning. The amendment in question was enacted in order to overcome the effect of the ruling of the many courts which had held, as did the court below in the case at bar, that the unamended act of November 21, 1918, prohibited only actually intoxicating beer. Of course, Congress would not have made this amendment if the act of November 21, 1918, already applied to *all* beer and wine, whether intoxicating or not. "It is a fundamental rule of construction that . . . when a previous statute is amended by an alteration of the terms used therein, it is to be presumed that it was the intent to alter the meaning of the previous act in that particular." *United States* v. *Bashaw*, 50 Fed. 749, 753,

reversed on other grounds, 152 U. S. 436; *United States* v. *Southern Pac. Co.*, 230 Fed. 270, 274.

IV.

As to the regulations or rulings of the Department of Internal Revenue.

From the time of the Civil War Revenue Act (July 13, 1866, 14 Stat. 164, sec. 48), taxable liquors have been described as "beer, lager beer, ale, porter, or other similar *fermented* liquor by whatever name such liquor may be called," with very little change in language until 1917. The Revenue Act of 1917 (40 Stat. 311, 312, sec. 307 and subd. b. of sec 313) for the first time described two groups of taxable liquors as follows: (1) "Beer, lager beer, ale, porter, and other similar fermented liquor, *containing one-half per centum or more of alcohol*, . . . by whatever name such liquors may be called," and (2) "unfermented grape juice, soft drinks or artificial mineral waters (not carbonated), and *fermented* liquors *containing less than one-half per centum of alcohol.*" Section 608 of the present tax law (act of February 24, 1919, 40 Stat. 1109) is in every material respect identical with the first of these two tax groups.

The taxing statutes prior to the Revenue Act of 1917 did not contain any reference whatever to one-half of one per cent. or, indeed, any percentage of alcohol. The limitation was first introduced in that act. If we apply to these taxing statutes the Government's contention that the word "beer" means *every* kind of beer regardless of

alcoholic content, it would necessarily follow that during the many years prior to 1917 the Treasury Department constantly misconstrued the revenue acts and failed to collect vast sums in taxes upon taxable commodities, since it consistently held during all that period that malt liquors with less than one-half per cent. of alcohol were not taxable at all, either as beer or as fermented liquor, and so held even where the beverage itself was commercially known as and called a "beer." See T. D. 1345 (April 18, 1908); T. D. 1360 (May 19, 1908); T. D. 2354 (August 2, 1916); T. D. 2359 (Sept. 9, 1916); T. D. 2410 (Dec. 8, 1916).

The Government's assertions in its brief filed in the *Standard Brewery* case, No. 458, that the Internal Revenue Department has defined "beer" as a substance with an alcoholic content of one-half of one per cent. and that that department of the Government has for a long time made that percentage of alcohol the test of an intoxicating beverage, are unfounded and entirely erroneous. The Internal Revenue Department has never been called upon or authorized to define the word "beer," and its rulings do not purport to do so. Under the taxing acts above referred to, the department has had to decide only whether a beverage was a "*fermented liquor*" in order to determine its taxability, and that, in sum, is the effect, and all the effect, of its decisions.

Moreover, it clearly appears that heretofore the Department of Internal Revenue has never been under any duty to decide for any purposes of taxation whether a beverage was intoxicating and has not even pretended so to do. Thus, in Treasury Decision No. 892 (April 26,

1905), in reply to a distinct inquiry upon this subject, the department wrote as follows:

> "Gentlemen: Your letter of the 19th instant has been received, relating to a beverage made from malt or from some substitute for malt, and fermented, and stating that 'the question arises frequently among brewers, what is the limit of alcoholic content that makes the beverages intoxicating—that is to say, from the legal point of view.'
>
> "The intoxicating character of such a beverage is important and material under the prohibitory liquor laws of a State or Territory, but, is not material under the Internal Revenue Laws of the United States. A fermented liquor made from malt,—for example, weiss beer—may contain so small an amount of alcohol, (say, 1½ or 1 per cent. or less) as to entitle it to be regarded as 'non-intoxicating' under the local prohibitory laws, but this fact does not relieve the brewer of this beverage from the necessity of giving bond and paying special tax as a brewer under the Internal Revenue Laws of the United States, as well as paying tax on this beer."

Again, in Treasury Decision No. 804 (June 29, 1904) the department declared that—

> "The question whether a fermented malt liquor is intoxicating or non-intoxicating is immaterial under the Internal Revenue Laws."

But on February 6, 1919, the Commissioner of Internal Revenue issued an attempted regulation to the effect that—

> "Within the intent of the Act of November 21, 1918, a beverage containing one-half of 1 per cent. or more of alcohol by volume will be regarded as intoxicating."

This regulation was plainly illegal and void. No statute authorized the Commissioner or any other officer to determine what was or was not an intoxicating liquor within

the meaning of the act of November 21, 1918. Congress had delegated that power to no one. It was a matter to be determined by court or jury in a proper case as the evidence might disclose. Indeed, in the *Hoffmann Brewing Co.* case (259 Fed. 321, 525), which directly challenged the validity of this alleged regulation of the Commissioner, the defendants, the Collector of Internal Revenue and the United States attorney, both admitted in their respective verified answers—

> "That the Commissioner of Internal Revenue is not and has never been authorized by law to determine what beverage is intoxicating, or what alcoholic content, if any, is required to render a beverage intoxicating, within the meaning of the act of November 21, 1918."

The regulation referred to, therefore, was an utterly unwarranted attempt by an official to add restrictions to those imposed by law, and thus, by mere administrative fiat, to convert into crimes conduct which Congress had never denounced as illegal. The nullity of such an interference is settled by numerous authorities.*

It should, furthermore, be borne in mind that, even if Congress had defined the term "beer" or "intoxicating liquor" as any fermented liquor containing one-half of one per cent. of alcohol for the purposes of the taxing acts,

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* *Waite* v. *Macy*, 246 U. S. 606, 608, affirming 224 Fed. 359, 362; *United States* v. *Morehead*, 243 U. S. 607, 614; *United States* v. *George*, 228 U. S. 14, 25; *United States* v. *United Verde Copper Co.*, 196 U. S. 207, 215; *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, 307; *Morrill* v. *Jones*, 106 U. S. 466, 467; *United States* v. *Williamson*, 207 U. S. 425, 461; *United States* v. *200 Barrels of Whisky*, 95 U. S. 571, 576; *Muir* v. *Louisville & Nash. R.R. Co.*, 247 Fed. 888, 895; *Bruce* v. *United States*, 202 Fed. 98, 103; *United States* v. *11,150 Lbs. of Butter*, 195 Fed. 657, 663; 188 Fed. 157, 160; *Leecy* v. *United States*, 190 Fed. 289, 292; *St. Louis Merchants Co.* v. *United States*, 188 Fed. 191, 195.

it would, nevertheless, not follow that that definition was applicable to the act of November 21, 1918, which is not a tax act and which does not, either expressly or impliedly, refer to any other act as definitive of its plain terms. Nothing could be more far-fetched than the reasoning which assumes that because Congress may have used such a definition for the purposes of certain particular acts relating to the taxation of *fermented*, not *intoxicating*, liquors, which acts are not referred to in or made a part of the act of November 21, 1918, it must be presumed to intend the same test as to the operation of other laws not relating to the subject of taxation. The fallacy in this mode of reasoning was strongly condemned in the opinion of Lord Chancellor Loreburn in *Macbeth & Co.* v. *Chislett*, [1910] A. C. 220, 223, when he spoke as follows in the House of Lords:

> "It would be a new terror in the construction of Acts of Parliament if we were required to limit a word to an unnatural sense because in some Act which is not incorporated or referred to such an interpretation is given to it for the purposes of that Act alone."

V.

THE ACT OF CONGRESS OF NOVEMBER 21, 1918, SHOULD BE STRICTLY CONSTRUED.

Even if it could reasonably be claimed that the construction contended for by the defendant-in-error was doubtful, it is submitted that it should, nevertheless, be adopted. It is manifest that the legislation in question is in derogation of the common law and common right, as well as of the reserved police powers of the several states. It would practically destroy what has always here-

tofore been a lawful business without any compensation whatever, and would do so by an extraordinary exercise of federal legislative power in a matter still within the jurisdiction of the states alone. It would deprive many of the states of a present source of large revenue from license fees and other forms of taxation. It is a criminal law. It is highly restrictive of personal liberty—not only of the liberty of the defendant and of the states, but as well of the liberty of the public with whom the defendant deals. It is an ostensible exercise of war power at a time when the war, if not at "an end," as the President has proclaimed, was in fact—whatever it may be in legal contemplation—wholly won and all but legally terminated, and the country was without any war necessity or emergency confronting it to justify any such legislation. And, finally, the statute is, in truth, not necessary to accomplish any legitimate war purpose; since under section 15 of the so-called Lever Act of August 10, 1917, the President is vested with plenary power, expressly reserved to him by the proviso in the act of November 21, 1918, itself, to deal with the use of food materials for the manufacture of malt or vinous liquors for beverage purposes, as the war situation might from time to time require. Under these circumstances such a statute should be strictly construed. *United States* v. *Salen*, 235 U. S. 237; *In re Johnson*, 224 Fed. 180, 183; *Sarlls* v. *United States*, 152 U. S. 570, 574; *United States* v. *Reese*, 92 U. S. 214, 219; *United States Condensed Milk Co.* v. *Smith*, 116 N. Y. App. Div. 15, 19, affirmed 191 N. Y. 536; 36 Cyc. 1179-1180; *Dickenson* v. *Fletcher* (1873), L. R. 9 C. P. 1, 7; *In re Cuno* (1889), L. R. 43 Ch. Div. 12, 17.

As there is at least grave doubt as to the constitutionality of the statute, it should, therefore, be construed so as to avoid the destruction without just compensation of the large property interests involved. As Mr. Justice Holmes declared in *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401:

> "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubt upon that score."

This rule of construction is peculiarly applicable to the act of November 21, 1918, where the ordinary meaning of the words used would call for a construction limiting the prohibition to intoxicating liquor and thereby avoid the destruction of property and business interests at a time when the President has declared that no war necessity warrants any further "ban upon the manufacture and sale of wines and beers" of any kind (see messages of May 20, 1919, and October 27, 1919, in appendix). If it still be true, as it unquestionably is, that "there can be no constructive offences, and [that] before a man can be punished, his case must be plainly and unmistakably within the statute" (*United States* v. *Lacher*, 134 U. S. 624, 628), it is submitted that no crime has been charged against the defendant-in-error in the case at bar.

VI.

DECISIONS OF THE LOWER FEDERAL COURTS INTERPRETING THE ACT OF CONGRESS OF NOVEMBER 21, 1918.

The construction urged by the defendant-in-error herein has been sustained by the Circuit Court of Appeals for the Second Circuit and ten district courts.

Jacob Hoffmann Brewing Co. v. *McElligott*, 259 Fed. 321, 330 (S. D. N. Y., A. N. Hand, D. J., and Mayer, D. J.), unanimously affirmed upon this point, 259 Fed. 525, 529, 541-2 (C. C. A., 2nd Cir., Ward, Hough and Rogers, C. JJ.); *United States* v. *Standard Brewery*, decided July 1, 1919, D. Md., Rose, D. J.; the case at bar which was decided without opinion, July 15, 1919, by Foster, D. J., E. D. La.; *United States* v. *Petts and Vogel*, decided July 15, 1919, D. Mass., Anderson, Cir. J.; *United States* v. *James Hanley Brewing Co.*, decided July 23, 1919, D. R. I., Brown, D. J.; *United States* v. *Ranier Brewing Co.*, 259 Fed. 359, 360 (N. D. Cal., Sawtelle, D. J.); *United States* v. *Baumgartner*, 259 Fed. 722 (S. D. Cal., Bledsoe, D. J.); *United States* v. *Mohr*, decided August 22, 1919, W. D. Wis., Sanborn, D. J.; *United States* v. *Porto Rico Brewing Co.*, decided August 23, 1919, D. Porto Rico, Hamilton, J.; *United States* v. *Valentine Blatz Brewing Co.*, decided without opinion, October 14, 1919, E. D. Wis., Geiger, D. J.

In none of the criminal cases above cited did the Government allege that the respective defendants had manufactured or sold intoxicating beer, or even "beer" unqualifiedly; all that was alleged in each case was that the defendant had manufactured or sold beer containing one-half of one per cent. of alcohol. This unvarying course of pleading by the Government in at least 14 instances conclusively shows that the Government would not rest upon the alleged meaning or effect of the word "beer," but sought to add to the act a definition or test of alcoholic content without alleging that it was intoxicating and thereby avoid tendering that issue of fact for trial. In-

deed, in none of the district courts has the Government been willing to try the issue whether beer containing even 2.75 per cent. of alcohol by weight (seven times one-half of one per cent. by volume) was or was not intoxicating.

The first of these cases—*Hoffmann Brewing Co.* v. *McElligott, supra*—was fully argued on behalf of the Government and carefully considered, and District Judge Augustus N. Hand held therein "that the act only prohibits the manufacture and sale of beer that is in fact intoxicating" (259 Fed. at p. 338). His opinion, which has already been referred to above, is too long to quote here, but its essential points may be summarized as follows:

> 1. That if the word "beer" as used in the statute did not signify only "intoxicating beer," no meaning would then be given to the word "other" directly preceding the phrase "intoxicating malt or vinous liquor for beverage purposes," and the entire provision would be rendered inconsistent and the meaning of the words forced and unnatural.
>
> 2. That Congress was dealing with the subject of intoxicating liquor, and that its prime object was, not to prevent the unnecessary consumption of food, which was already adequately guarded against by the act of August 10, 1917, but to conserve man power and efficiency.
>
> 3. That the contrary construction urged by the Government would attribute to Congress an arbitrary intention to single out non-intoxicating beer for prohibition and leave other non-intoxicating malt liquors, such as ale, stout and porter, to be freely manufactured and sold.
>
> 4. That, if the rule of *noscitur a sociis* were ever to be employed as a canon of construction, it was applicable in the present instance because of the compactness of the whole clause and the close relation of the word "other" to the descriptive or defining word "intoxicating."

These views were unanimously affirmed by the Circuit Court of Appeals for the Second Circuit on June 26, 1919 (259 Fed. 525, 529, 541-2). Circuit Judge Ward said (at p. 529):

> "We concur in the construction of the statute by the court below."

Circuit Judge Hough described the contrary construction urged by the Government as a "strained construction" (at p. 542), and Circuit Judge Rogers declared (at pp. 541-2):

> "I am unable to see any escape from the conclusion that Congress in enacting the law had in mind *intoxicating* liquors. In that conclusion I agree with my associates.
>
> "Whether beer containing not more than 2.75 per cent. of alcohol is intoxicating is not a question of law, but one of fact, and will be determined at the final hearing upon the merits."

In *United States* v. *Standard Brewery, supra,* Judge Rose said of the act of November 21, 1918, that—

> "It is a penal law and it may not be so interpreted as to make punishable anything which it does not clearly forbid. I cannot now say that it clearly forbids the making or sale of beer which is not intoxicating, because five of the judges of the Second Circuit have each expressed the opinion that it has no relation to anything which is not intoxicating."

In *United States* v. *Petts and Vogel*, unreported, Circuit Judge Anderson of Boston used the following language:

> "I am perfectly clear that no such strained construction should be given to this statute, which was passed for the purpose of 'conserving the man power of the Nation, and to increase efficiency in the production of arms, munitions, ships, food, and clothing for the Army and Navy,' by prohibiting the use of intoxicating liquor as a beverage.

"If I were in doubt—as I am not—I should feel constrained to adopt the view of the Circuit Court of Appeals for the Second Circuit affirming the decision of the District Court. This construction has also been adopted by the District Court of Maryland.

"I may add that the serious purpose of Congress and of a large part of the voters of this country to prevent the use of intoxicating liquors as a beverage ought not to be attempted to be made ridiculous by an absurd misconstruction of this statute."

Entirely similar views were expressed by District Judge Brown of Providence in *United States* v. *The James Hanley Brewing Co.*, unreported, where he said:

"I agree with the decision of the Second Circuit Court of Appeals in considering this act as applying entirely to intoxicating liquors. Furthermore, I would find independently without regard to the decision of said court, that the War Time Prohibition Act applies only to intoxicating liquors."

In *United States* v. *Ranier Brewing Co. et al.*, 259 Fed. 359, 360, District Judge Sawtelle at San Francisco independently re-examined the question and summarized his conclusions thereon as follows:

"To further aid in carrying out the declared purpose of the act, namely, 'to conserve the man-power of the nation and to increase efficiency,' as aforesaid, it was provided in said act that after May 1st, 1919, 'and until after the termination of demobilization, . . . no grains, cereals, fruit or other food product shall be used in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquors for beverage purposes.' It was further provided in the act—and it is this provision that defendants herein are charged with having violated—that 'after June 30th, 1919, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United

States, no beer, wine, or other intoxicating malt or vinous liquor shall be sold for beverage purposes except for export.' Keeping in view the purpose of the act, Congress added this provision: 'After the approval of this act, no distilled, malt, vinous, or other intoxicating liquors shall be imported into the United States during the continuance of the present war and period of demobilization.' The word 'beer' is omitted from this provision and the word 'malt' is substituted therefor. I think Congress was not interested in providing against the importation of malt liquors containing, we shall say, one-fourth of one per cent. of alcohol, but against the importation of intoxicating liquors. Manifestly, the words 'other intoxicating liquors' relate to and qualify the preceding word 'malt,' so that only intoxicating malt liquors were within the statute.

"After a careful analysis of the statute under which this prosecution has been brought, I have concluded that the words 'or other intoxicating malt or vinous liquors' qualify the preceding words 'beer' and 'wine,' and that it is not unlawful to sell beer which is not intoxicating. Therefore to bring beer within the prohibition of the act the information should allege that it was intoxicating."

District Judge Bledsoe of Los Angeles gave "the matter the benefit of [his] own independent judgment" in *United States* v. *Baumgartner*, 259 Fed. 722, and reached the same result. He said (at p. 724):

"I think from a careful reading of the statute it was the intention of Congress that the sale of intoxicating beer only should be prohibited. True it is, in words, the inhibition was laid against beer and wine, with no qualifying description; but true it is also that that was done within the limits of the same sentence, and in immediate proximity to language, which proclaimed an inhibition against 'all other intoxicating malt or vinous liquor.' It is both necessary and permissible here to use two well established rules of statutory construction. First, the doctrine of 'noscitur a

which means that 'the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it' (29 Cyc. 1065); and also the doctrine of 'ejusdem generis,' which in its practical application simply means that 'general and specific words which are capable of an analogous meaning, being associated together, take color from each other, so that the general words are restricted to a sense analogous to the less general.' 3 Words & Phrases Judicially Defined, p. 2328. . . . Employing these aids to construction, I am persuaded that the words beer and wine, as used in the statute, were intended by Congress to be qualified and explained by the words immediately following, and that they were intended to include only beer or wine which was in fact intoxicating. It is a familiar rule that 'a thing which is within the intention of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers.' *Insurance Co.* v. *Gridley*, 100 U. S. 614, 615.

"The government contends, however, that irrespective of subsequent expressions, the use of the unmodified phrase 'beer,' makes the sale of 'beer,' whatever its alcoholic content or intoxicating effect, under the statute, unlawful. If the government's contention be correct, then the clause in question should be read as if it had been enacted as follows: '. . . No beer or wine, whether intoxicating or not, shall be sold.' If Congress had said this, though, it would have followed it up by saying that in addition, 'no other malt or vinous liquors, whether intoxicating or not, shall be sold.' But this last it did not say, but did say that no other 'intoxicating' malt or vinous liquor should be sold. It cannot reasonably be contemplated, in my judgment, that Congress for any cause, conservation of man power, increase of efficiency, or conservation of foodstuffs, intended to prohibit the sale of non-intoxicating wine and beer, and yet intended to permit the sale of other non-intoxicating malt and vinous liquors. Congress surely

intended to be sensible and consistent. This could be accomplished only by the inhibition being laid upon all the non-intoxicating liquors included within the terms malt and vinous liquors, or by the inhibition being laid only on the intoxicants included therein. The former, Congress did not do, because the statute expressly inveighs against nothing but 'intoxicating malt and vinous liquors.' It therefore permits, because not otherwise contrary to law, the sale of non-intoxicating malt and vinous liquors. It did not therefore intend, in my judgment, to prohibit the sale of non-intoxicating beer or wine, if there be such commodities. This view is arrived at by a process of thought made use of by Judge Deady of the Oregon district, in a strikingly similar situation, in *United States* v. *Loftis*, 12 Fed. 671, 673. 'The general phrase with which the enumeration ends . . . impliedly asserts that the things before enumerated' are to be of an intoxicating character.

"This conclusion, I think, is fortified by a recapitulation of the inhibitions prescribed by Congress for the war-time period. By the act of August 10, 1917, the substantial features of which were kept in effect by the act of November 21, 1918, it was provided that after September 10, 1917, no foods, fruits, etc., should be used in the production of distilled spirits. It was likewise provided that after that date no distilled spirits should be imported into the United States. 'All spirituous liquor is intoxicating.' 23 Cyc. 59. By the later act, arraying the matters mentioned consecutively in point of time, it was directed that after November 21st, the President, in defined industrial zones, at his discretion, because of the pressing necessity therefor, might prohibit the sale, manufacture, or distribution of 'intoxicating liquors.' After November 21st, no distilled, malt, vinous, or other intoxicating liquors were to be imported. After May 1st, no grains, cereals, fruits, etc., should be used in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquor. After June 30th, no distilled spirits were to be sold, and also after June 30th, no beer, wine, or other intoxicating malt or

vinous liquors were to be sold. Throughout the whole course of this legislative history upon this particular subject, as thus portrayed, the idea is ever present that Congress was intending to place a restraint upon either the manufacture, the importation, or the sale of *intoxicating liquors*. In no way in which these provisions may be read, taken altogether, does it appear at any time that Congress was intending to place an embargo upon either the manufacture, sale, or importation of anything which was in fact non-intoxicating, and therefore not destructive in its effect upon the individual consumer thereof.

"This view is made materially manifest, in my judgment, by a consideration of the additional fact, above adverted to, that in the presence of the greatest necessity which Congress had in mind, and in which the embargo was to be laid only at the discretion of the President, to wit, in connection with the establishment of zones about highly necessary industrial activities, in that particular and important instance, where even the manufacture itself of the commodity was expressly forbidden, the prohibition decreed extended only to intoxicating liquors, and did not include non-intoxicants.

"My conclusion is that the act in question attempts and intends to prohibit the sale of intoxicants only, whether beer or wine or other beverage. By that term must be understood 'any liquor intended for use as a beverage, or capable of being so used, which contains such a proportion of alcohol that it will produce intoxication when imbibed in such quantities as it is practically possible for a man to drink.' 23 Cyc. 57."

In *United States* v. *Mohr*, unreported, District Judge Sanborn of Madison, Wis., spoke as follows:

"I think the plain purpose of Congress in the Act of 1918 was to conserve the man power of the nation by preventing intoxication or drunkenness and that the word 'beer' in the statute means only such beer as is actually intoxicating. I am satisfied that the better reasoning is that used by the judges of the second circuit in New York."

This ruling is all the more noteworthy since, in making it, Judge Sanborn refused to follow the contrary opinion expressed by Circuit Judge Page of Chicago in *United States* v. *Stenson Brewing Co.* (decided July 25, 1919, N. D. Ill.), a decision of a judge sitting in the same circuit with him, because, as Judge Sanborn declared, "the better reasoning is that used by the judges of the second circuit in New York." It is also noteworthy that Judge Sanborn did not view the purpose of the act as Judge Page did. The latter believed that it was intended to conserve the man power of the nation, not "by preventing intoxication or drunkenness," as Judge Sanborn declared, but by compelling the individuals engaged in the businesses affected to seek other employment. In this respect, too, Judge Sanborn, it is submitted, was in the right. It will be recalled that immediately after the signing of the Armistice all the efforts which the Government had theretofore been making to force individuals of draft age out of non-essential employments were abandoned. It was recognized that the practical termination of the war would necessarily bring about considerable unemployment, and, of course, the Government felt it to be its duty, in the administration of the draft laws, not to aggravate the unemployment situation. Judge Page's view, however, is in direct opposition to this wise policy. It is hardly conceivable that Congress, acting after the Armistice and on November 21, 1918, had any such purpose as he ascribed to it.

District Judge Geiger of the Eastern District of Wisconsin in *United States* v. *Valentine Blatz Brewing Co.*, decided at Milwaukee October 14, 1919, unreported, also

refused to follow the ruling of Judge Page in the same circuit, and quashed an indictment because it failed to charge that the beer manufactured by the defendant was intoxicating. He wrote no formal opinion, but his oral comments plainly indicated that he adopted the views herein contended for.

A recent ruling upon the subject is that of Judge Hamilton of Porto Rico in *United States* v. *Porto Rico Brewing Co.* His discussion of the question reads as follows:

> "The exact question to be determined is whether . . . the words 'beer, wine' are absolute in their meaning or whether they are to be construed in connection with the immediately succeeding words 'or other intoxicating malt or vinous liquors.' The point has received great consideration, particularly in the opinion filed May 17, 1919, by Judge A. N. Hand in the case of *Hoffmann Brewing Co.* v. *McElligott, Internal Revenue Collector*, in the District of New York; afterwards affirmed by the Circuit Court of Appeals June 26, 1919. These cases are not in all points the same with the one at bar, because they arise on the civil side of the court, in suits in equity to enjoin officials from enforcing the law in question against certain brewing companies, while the case at bar is on demurrer to a criminal information. The question as to the construction of the same statute must be the same, however, and the conclusion there reached must be the conclusion reached from any critical point of view. It is quite true that in *Holy Trinity Church* v. *United States*, 143 U. S. 457, the Supreme Court construed a statute to mean something which did not appear upon the surface and declared that courts have the right to disregard useless wording when, as surplusage, it interferes with the true object of a statute. This principle, however, does not apply in the case at bar. The Eighteenth Amendment declaring prohibition in the United States does not go into effect until January, 1920, and cannot now be taken into account. Social

or political questions or desires cannot be taken into account by a court. A court is to construe a statute as it finds it, not as it could have been made or even as it ought to have been made. These are questions for the legislature and not for the court.

"A general phrase assembling, so to speak, the preceding individual phrases is to be construed as determining the general meaning. When St. Paul speaks of 'neither life nor death nor principalities nor powers nor any other creature,' he is to be construed as thinking of these different things and considering them under the class of creatures. The law forbidding the mailing of 'books, pamphlets, pictures, papers, writings, prints or other publications of an indecent character' implied that the things first enumerated were also publications. *United States* v. *Loftis*, 12 F. 671. This has indeed been declared by the United States Supreme Court to be a well defined rule of construction, *United States* v. *Chase*, 135 U. S. 255, 258 (Lamar, J.), as was recognized by Congress when after the *Chase* case it amended the act to embrace letters which were not publications. *Andrews* v. *United States*, 162 U. S. 420; *United States* v. *Cohn*, 52 S. W. 39.

"The Selective Service Law of May 18, 1917, 40 Statutes at Large, p. 76, forbade the sale of intoxicating liquors at military reservations. The Food Control Act of August 10, 1917, 41 Stat. at Large, pp. 27, 61, referred to in the act now in question, and to be taken therefore *in pari materia*, forbids the use of food materials for the production of distilled spirits for beverage purposes, and distilled spirits might otherwise be expressed for present purposes as intoxicating liquors. The legislative history (*Blake* v. *National Banks*, 23 Wall. 317, 319) of the prohibition rider now under discussion seems to show that amendments prohibiting alcoholic beverages in general failed of enactment and the present provision which uses the word 'intoxicating' was substituted.

"Upon the whole, therefore, there seems to be no other reasonable construction of the present statute

than that the words 'other intoxicating' show that the previous words 'beer' and 'wine' must be interpreted as being also 'intoxicating.' "

It would extend this brief to an undue length to criticize in detail the opinions of the few district courts which in any wise sustain the contentions of the Government. They must, however, be briefly noticed and without repetition of the matters already considered, which, in fact, dispose of all of them.

In *United States* v. *Pittsburgh Brewing Co.*, unreported, decided July 15, 1919, W. D. Pa., District Judge Thomson laid great stress upon the ruling of the Commissioner of Internal Revenue of February 6, 1919, which he mistakenly believed to have been made "prior to the passage of the act" of November 21, 1918, and which ruling, as has been above pointed out, was quite void, and conceded so to be by the Government in the New York cases. His only other reason for his holding was that he believed the act in question to be analogous to an act prohibiting "the manufacture and sale of opium, morphine sulphate, and other poisonous narcotic drugs." The analogy is, however, inapt. All opium and morphine sulphates are poisonous and narcotic, but all beer and wine is not intoxicating. There is, therefore, in the act of November 21, 1918, opportunity for the phrase "other intoxicating malt or vinous liquor" to operate selectively upon the expressions "beer" and "wine" and apply only to the intoxicating varieties thereof, while there is no such opportunity for selective action in the illustration given by Judge Thomson. A true parallel to Judge Thomson's illustration would be: "Whisky, gin, or other intoxicat-

ing liquor," but that is wholly different from the statute in suit herein. It should, furthermore, be borne in mind that Judge Thomson's opinion did not even attempt to reconcile itself with the controlling rulings of this court in the *Chase* case, 135 U. S. 255, and the *United Verde Copper Co.* case, 196 U. S. 207.

It is unnecessary to examine at any length the reasoning of District Judge Dickinson in *United States* v. *Bergner & Engel Brewing Co.*, unreported, opinion rendered July 17, 1919, E. D. Pa. He refused either to sustain or overrule the defendant's demurrer, and declared the question of statutory interpretation to be one for determination upon the trial. He has recently explained his position in open court, stating that he did not in the opinion above mentioned intend to pass upon the construction of the act of November 21, 1918, that he would decide that question at the trial, and that he would expect the United States attorney to be ready to prove that the beer there in question was intoxicating, if he should then conclude that the act banned only actually intoxicating beer.

District Judge Rose in *United States* v. *Standard Brewery*, decided July 1, 1919, D. Md., sustained a demurrer to an indictment. It is true, he indicated a doubt as to the correctness of his ruling. He seemed to think that Congress had intended to reach all *fermented* liquors because these had theretofore been subjected to taxation. But he expressly admitted that "Congress has not used those words. It has used others which may mean that it intended to forbid the making and sale of nothing which is not intoxicating." He

should also have observed that, under any construction, Congress had prohibited only "intoxicating malt or vinous liquor," which plainly excluded many fermented beverages if they were not in fact intoxicating. His further observation that the history of the act and its contemporaneous interpretation by Congress give some support to the contention of the Government, is plainly untenable in view of what has been adduced upon those points above.

In *United States* v. *Schmauder*, 258 Fed. 251 (D. Conn.), District Judge Chatfield referred to the ruling of the Circuit Court of Appeals made during the preceding month in the *Hoffmann Brewing Co. case*, 259 Fed. 525, 529, 541-2, in so far as it construed the act of November 21, 1918, as "*dictum* on the part of the court" (258 Fed. at p. 254); but in that he was plainly wrong. In that case the Department of Internal Revenue was charged with having erroneously interpreted the act of November 21, 1918, and, consequently, with having directed the defendant Collector of Internal Revenue to act illegally, in charging him with the duty to cause this enactment, as thus misconstrued, to be enforced against the complainant and other brewers similarly situated. An injunction restraining the Collector from causing the complainant to be prosecuted under this erroneous interpretation was granted by the district court and affirmed by the Circuit Court of Appeals. In reaching this part of its decision it was, therefore, necessary for the court to decide what was the proper construction of the act. That question was raised by the pleadings, fully argued in both courts and deliberately determined. It was, therefore, obviously not

mere *dictum*. Even if the Circuit Court of Appeals had seen fit to dispose of the case on other grounds, nevertheless, since the point was presented, argued and passed upon, the pronouncement of the court thereon would, under the settled rule, have been, not *dictum*, but authoritative decision. *Railroad Companies* v. *Schutte*, 103 U. S. 118, 143; *Union Pac. Co.* v. *Mason City Co.*, 199 U. S. 160, 166; *United States* v. *Chamberlin*, 219 U. S. 250, 262.

It was, therefore, surprising that Judge Chatfield, sitting in an inferior court in the Second Circuit, did not follow the plain decision of the Circuit Court of Appeals of that circuit. However, it is not clear from his opinion that he intended to disregard the ruling of the higher court, for he said (258 Fed. at p. 256):

> "If on a trial on the merits it should appear that the lager beer in question is not of an intoxicating nature, and is not what Congress evidently meant to prohibit, the matter can be disposed of as a question of fact."

But he added:

> "Under the Internal Revenue laws and all standards by which Congress could have viewed the matter, the beer described in the present information was of the class known as intoxicating liquor, and as such its sale was prohibited."

This assertion was unfounded. As has been shown, the internal revenue laws have not defined what is intoxicating beer or intoxicating liquor; and even if they had, the act of November 21, 1918, did not incorporate into itself any such definition. If the court meant that, because the information charged a sale of "*lager* beer," it would presume the beverage to be intoxicating, the decision is no precedent in the case at bar because the liquor

a suit is not described as lager beer in the indictment, but only as half per cent. beer. But even the correctness of any such presumption is very doubtful. *Blatz* v. *Rohrbach*, 116 N. Y. 450, 455.

The opinion of Judge Page in *United States* v. *Stenson Brewing Co.*, decided July 25, 1919, N. D. Ill., unreported, is too long for detailed review here and is, indeed, disposed of in what has already been written. It should be pointed out that District Judges Sanborn and Geiger, sitting in the same circuit, have refused to follow it in subsequent cases. Judge Page like Judge Thomson was led into error by misconception of the scope and effect of the rulings of the Department of Internal Revenue, and by giving force to the wholly unauthorized ruling of the department dated February 6, 1919, attempting to interpret the act of November 21, 1918, which ruling the Government has conceded to be void and has repudiated in the New York cases.

Judge Page, moreover, completely failed to appreciate the force and effect of such authorities as *United States* v. *Chase*, 135 U. S. 255, and *United States* v. *United Verde Copper Co.*, 196 U. S. 207.

A careful perusal and comparison of the opinions rendered interpreting the act in suit will disclose that, not only the weight of authority, but the decided weight of reasoning, is on the side of the defendant-in-error.

VII.

THE TERMS "BEER" AND "INTOXICATING" IN THE ACT OF CONGRESS OF NOVEMBER 21, 1918, CONSIDERED AND DEFINED.

In the briefs submitted on behalf of the Government in the *Ruppert* and *Standard Brewery* cases, Nos. 603 and 458, it has been suggested that Congress and the Internal Revenue Department have fixed an artificial meaning upon the terms "beer" and "intoxicating" and that this definition, although not even referred to in the act of November 21, 1918, must, nevertheless, be affixed to its language. But, as has already been sufficiently pointed out above, neither Congress nor the Internal Revenue Department has ever defined what is "beer" or what constitutes an "intoxicating liquor"; indeed, the department has never had occasion to determine anything more than what constitutes a "fermented liquor," and has expressly and distinctly declined to say what renders any beverage intoxicating, that being a matter with which it has heretofore had no concern whatever. Nor has any other department of the Government undertaken to decide that question in so far as it concerns the ordinary citizen. In fact, the Post Office Department (Liquor Bulletin No. 2, June 15, 1917) has ruled as follows under the provision of the Reed Amendment (act of March 3, 1917, 39 Stat. 1058, ch. 162) making certain written matter relating to intoxicating liquors non-mailable:

> "Since the passage of the act the department has received many requests from manufacturers, dealers, publishers, and editors for specific rulings as to whether or not certain liquids are 'intoxicating liquors' within the meaning of the act.

> "The inquiries have been answered in each case by the statement that what is or what is not 'intoxicating liquor' within the meaning of the act is a question of fact to be determined from all available evidence."

In a brief submitted by the Government to this court in the case of *United States* v. *Standard Brewery, Incorporated*, it is asserted in one place (p. 11) that—

> "Beer usually is admittedly an intoxicating beverage and is so classed in the public mind,"

while in another place (p. 17) the following appears—

> "Words used in a statute must be given their usual and ordinary meaning unless a contrary intention is expressed. No such intention having been expressed, the question is, What is the usual and ordinary meaning of the word 'beer'? All the dictionaries define it as an *alcoholic* beverage obtained by the fermentation of malt or certain other substances. . . . But the word 'intoxicating' appears in no definition. *In common acceptation, therefore, beer is an alcoholic but not necessarily an intoxicating beverage.*"

It is then argued by the Government that the "common acceptation" is not to be placed upon the language of the act in suit. But it is well settled that criminal statutes, whose prohibitions are, of course, directed to the public generally and intended to guide and deter the plain man, speak the language of the common people. The ordinary meaning must, therefore, be given the common terms employed in the act. So this court expressly held in *Sarlls* v. *United States*, 152 U. S. 570, 574.

It is further argued in the brief referred to (p. 10) that—

> "The word 'intoxicating' can scarcely be said to have a very definite meaning,"

and hence it is asserted that the word "intoxicating" in the statute should be read as the equivalent of "alcoholic." Of course, Congress did not employ the latter term, and if it had intended any such meaning, it could easily have used apt language. In fact, to repeat, the 65th Congress did not pass a bill (H. R. 14,915) whose express purpose it was "to define intoxicating liquors" as "all liquors containing alcohol." The term "intoxicating" has been employed in its ordinary significance in innumerable statutes and in the Eighteenth Amendment to the Constitution itself. Men in ordinary life have no difficulty in understanding its meaning. It can be no more embarrassing to courts or juries to decide whether a liquor is intoxicating than to decide whether an act was negligent, or wilful, or fraudulent, or malicious, as a multitude of enactments require them to do. It should, furthermore, be appreciated that, even if all beer and all wine were deemed to be within the prohibition of the statute, juries would still have to say, under the plain language of the act, whether other malt and vinous liquors were intoxicating, such as, *e. g.*, ale, porter, stout, etc., and whether liquor sold in war zones fixed by the President was intoxicating. The supposed difficulty of enforcement which the Government apprehends cannot, consequently, be eradicated under any circumstances.

But contrary to the suggestion of the Government the word "intoxicating" has a well-defined meaning. A comprehensive study of the authorities, legal and lexicographical, has evolved the following definition of "intoxicating liquors" and "intoxication" or "drunkenness":

Intoxicating liquors are those liquors which are

> intended for use as, or capable of being used as, a beverage, and which contain alcohol in such proportion or per cent that when consumed in the quantity which may practically be drunk by an ordinary man, or in any quantity which the human stomach will ordinarily hold, will produce a condition commonly known as intoxication or drunkenness. Drunkenness or intoxication is a materially abnormal mental or physical condition, manifesting itself in the loss of the ordinary control of the mental faculties or bodily functions to an appreciable or material extent.

Some of the elements of this definition are axiomatic. Thus, of course, a liquor to be intoxicating must be a beverage or capable of use as such. And equally clearly it must contain alcohol to some extent. How much alcohol is peculiarly a question of fact. In the *Intoxicating Liquor Cases*, 25 Kan. 751, 768, Judge Brewer (late of this court) said:

> "The courts cannot say, as a matter of law, that the presence of a certain per cent of alcohol brings the compound within the prohibition."

In *Board of Commissioners* v. *Taylor*, 21 N. Y. 173, 179, the court expressed the following conclusion:

> "It seems to me that but one safe and sensible line of distinction can be drawn between the different kinds of liquor containing alcohol, in order to determine upon which of them the statute was intended to operate; and that is, between those which are capable of causing intoxication, and those containing so small a percentage of alcohol that the human stomach cannot contain sufficient of the liquor to produce that effect; as is said to be the case with respect to spruce beer, ginger beer, lager beer and some others."

In *State* v. *Piche*, 98 Me. 348, 351, the court said:

> "Whether such liquors are intoxicating, is a question of fact to be proved by any competent evidence, the same as any other question of fact, and the force and effect of such evidence are for the jury to deter-

> mine. The composition and character of the liquor, the amount of alcohol it contains, and in what quantities it will produce intoxication, are all competent evidence tending to determine the question. The court cannot say as a matter of law that a liquor which contains three per cent or more of alcohol, is intoxicating, and that one which contains a less percentage is not; but in every case this question must be determined by the jury, from all the evidence before them."

And in *Commonwealth* v. *Blos*, 116 Mass. 56, 58, the following language was used in reference to "Schenck Beer," which was claimed to contain from five to five and one-half per cent of alcohol:

> "The apparent purpose of the statute is to provide that distilled spirits, and all liquors with which distilled spirits are mixed, and also all the liquors included by name in the specific enumeration above quoted, shall be conclusively deemed intoxicating, and the question whether they are intoxicating in fact shall not be raised at the trial. But with regard to all other liquors, this question is one to be determined by the jury upon the evidence, like any other question of fact. . . .
>
> "The fact that alcohol was discovered in it upon a chemical analysis, although undoubtedly competent evidence, does not necessarily prove that the liquor was spirituous, within the meaning of the statute. . . . The question whether it was an intoxicating liquor or not should have been submitted to the jury."

See also: *State* v. *May*, 34 Pac. 407 (Kan.); *Estes* v. *State*, 166 Pac. 77 (Okl.); *Marks* v. *State*, 159 Ala. 71; *State* v. *Virgo*, 14 N. Dak. 293.

The quantity of the liquor under inquiry which must be consumed in order to determine whether it is intoxicating or not, has been generally expressed in one of two ways, namely, (1) such quantity as may be practically drunk

by the ordinary man, and (2) such quantity as the stomach will ordinarily hold. Both of these measures are incorporated in the above definition. The court will find the first delimitation stated in the following authorities: Black's Law Dictionary (2nd ed.); Black on Intoxicating Liquors, sec. 2; 23 Cyc. 57; *Marks* v. *State*, 159 Ala. 71, 81; *Decker* v. *State*, 39 Tex. Crim. 20; *Mason* v. *State*, 1 Ga. App. 534; *Taylor* v. *State*, 49 S. W. 589; *United States* v. *Baumgartner*, 259 Fed. 722, 726; and the second in the following: *Board of Commissioners* v. *Taylor*, 21 N. Y. 173, 179; *People* v. *Zeiger*, 6 Park Crim. 355; *Blatz* v. *Rohrbach*, 116 N. Y. 450, 455; *James* v. *State*, 49 Tex. Crim. 334.

These groups of decisions clearly imply that it is the drinking capacity of the *ordinary man* which is the test, and not the drinking capacity of any extreme type of individual or one with idiosyncracies. Thus, the first group of cases lays the emphasis upon the quantity which "may be practically drunk," while the second emphasizes the quantity which "the human stomach" can ordinarily contain. It is to be observed that the test is nowhere stated to be that minimum of the liquor which *any individual* can drink or *any* human stomach hold. As is usual in the law, the ordinary person under ordinary circumstances constitutes the standard or norm to be adopted. The slightest reflection must reveal that that is, indeed, the conception which is commonly intended when we speak of "intoxicating liquors" in everyday life. Otherwise there could be no common standard or mutual understanding between men when they employed these terms. In *Heintz* v. *Le Page*, 100 Me. 542, 545, and Joyce on In-

toxicating Liquors (sec. 3), the "ordinary person" is referred to in defining the term "intoxicating liquor." Such liquor is declared to be one "that may be drank by the ordinary person as a beverage, and in such quantities as to produce intoxication." See also 1 Woolen & Thornton on Intoxicating Liquors, sec. 6, p. 13.

The suggestion heretofore made by the Government that the intoxicating quality of a liquor is to be determined, not by the ordinary person, but by some other, as "any possible user" is not only indefinite, but results in making the act of November 21, 1918, a criminal statute, either a snare and a pitfall or else meaningless. It is surely conceivable that somewhere there may be found an individual, so neurotic and weakened or so idiosyncratic, that a spoonful of any fermented liquor or a cup of grape juice, coffee, or other harmless substance, would work extraordinary, and perhaps highly deleterious, effects upon him. But what reasonable being would assert on that account that grape juice, coffee, or other substance, was poisonous or intoxicating? Under the Government's view, Congress and the President meant and accomplished nothing of any practical value, when in the act of November 21, 1918, and in the various presidential proclamations under the act of August 10, 1917, respectively, they forbade only *intoxicating liquors*. An individual who made or sold a liquor which he and his customers and neighbors in good faith believed to be absolutely non-intoxicating, and which their united experience therewith had uniformly shown to be non-intoxicating, might, nevertheless, if the Government's theory be the law, be convicted of a crime, if some degenerate or weakling could be

produced who had been affected by the beverage. The outcome is as absurd as it would be unjust, and it is submitted that no court will adopt as law the rule which would produce it.

Quite obviously an intoxicating liquor must be one that will produce intoxication or drunkenness. It must, therefore, produce a substantially altered and abnormal condition in the drinker and not merely stimulate or influence him slightly; otherwise coffee and tea, grape juice and innumerable other non-intoxicants, would have to be classified as intoxicating liquors, because they, too, upon occasion can produce distinct, stimulating, refreshing, or other observable effects. In the Standard Dictionary "drunk" is defined as "being under the influence of intoxicating liquor to such an extent as to have lost the normal control of one's bodily and mental faculties." In Bouvier's Law Dictionary it is said that "the term drunkenness is applied only to those degrees of it in which the mind is manifestly disturbed in its operations," and in Black's Law Dictionary (2nd ed.) it is declared that—

> "A person is 'drunk' when he is so far under the influence of liquor that his passions are visibly excited or his judgment impaired, or when his brain is so far affected by potations of liquor that his intelligence, sense-perceptions, judgment, continuity of thought or of ideas, speech, and co-ordination of volition with muscular action (or some of these faculties or processes) are impaired or not under normal control."

See also *Sapp* v. *State*, 116 Ga. 182; *Lafler* v. *Fisher*, 121 Mich. 60; *St. Louis, I. M. & S. Ry. Co.* v. *Waters*, 152 S. W. 137 (Ark); *Gard* v. *State*, 15 Oh. C. C. (n. s.) 255; *O'Connell* v. *State*, 5 Ga. App. 234; *O'Donnell* v. *Com-*

monwealth, 108 Va. 882; *State* v. *Pierce*, 65 Iowa 85; *Wadsworth* v. *Dunnam*, 98 Ala. 610; *Columbia L. Ins. Co.* v. *Tousey*, 152 Ky. 447; *State* v. *Nethken*, 60 W. Va. 673; Webster's International Dictionary.

It should be further pointed out that the word "intoxicating," as used in the act of November 21, 1918, and in the foregoing authorities, is not employed in the peculiar and scientific sense in which medical men sometimes use it as denoting *intoxico* or poison. The physical and mental condition termed "intoxication" in ordinary speech has little, if anything, in common with the pathological condition which physicians describe, *e. g.*, by the appellation "auto-intoxication," which may exist without imbibing any alcohol at all. These various usages of the term in question should not be confused.

VIII.

As to the jurisdiction of this court.

Counsel deem it their duty to call the court's attention to the fact that the record in the case at bar fails to disclose affirmatively that the action of the court below in sustaining the demurrer to the indictment was based upon the construction of the act of Congress of November 21, 1918, rather than upon considerations of general criminal law affecting the sufficiency of the indictment. If that be so, the cases of *United States* v. *Carter*, 231 U. S. 492, and *United States* v. *Moist*, 231 U. S. 701, would compel the dismissal of the writ of error. Counsel believe it fit and proper to add that the court below in fact sustained the

demurrer because it construed the statute in question as prohibiting only intoxicating beer, and that it is earnestly urged that the general importance of the question will warrant an authoritative decision on the merits.

CONCLUSION.

For the foregoing reasons it is submitted that by the true interpretation of the act of Congress of November 21, 1918, the prohibition in question applies only to intoxicating beer, and that, therefore, the judgment below was right and should be affirmed.

New York, December 5, 1919.

ELIHU ROOT,
WILLIAM D. GUTHRIE,
Of counsel for defendant-in-error.

APPENDIX.

Proclamations and Messages of the Prseident.

Proclamation and executive order of December 8, 1917, limiting alcoholic content of malt liquors, viz.:

> "Whereas, under and by virtue of an act of Congress entitled 'An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel,' approved by the President on August 10, 1917, it is provided in section 15, among other things, as follows:
>
> 'Whenever the President shall find that limitation, regulation, or prohibition of the use of foods, fruits, food materials, or feeds in the production of malt or vinous liquors for beverage purposes, or that reduction of the alcoholic content of any such malt or vinous liquor, is essential, in order to assure an adequate and continuous supply of foods, or that the national security and defense will be subserved thereby, he is authorized, from time to time to prescribe and give public notice of the extent of the limitation, regulation, prohibition, or reduction so necessitated. Whenever such notice shall have been given and shall remain unrevoked, no person shall, after a reasonable time, prescribed in such notice, use any foods, fruits, food materials, or feeds in the pro-

duction of malt or vinous liquors, or import any such liquors except under license issued by the President and in compliance with rules and regulations determined by him governing the production and importation of such liquors and the alcoholic content thereof.'

"Now, therefore, I, Woodrow Wilson, President of the United States of America, by virtue of the powers, conferred on me by said Act of Congress, do hereby find and determine that the national security and defense will be subserved by the limitation of the amount of foods, fruits, food materials, and feeds used in the production of malt liquor, and by reduction of the alcoholic content of malt liquor produced in the United States. And by this proclamation I prescribe and give public notice that on and after January 1, 1918, the total amount of foods, fruits, food materials, and feeds used by any person in the production of malt liquor shall not exceed seventy per cent. (70%) of the average consumption of any such foods, fruits, food materials, or feeds in the production of such malt liquor by such person during the period from January 1, 1917, to January 1, 1918, the unit of time to be fixed by regulation; and that on and after January 1, 1918, no malt liquor except ale and porter shall be produced in the United States containing more than two and three quarters per cent. (2.75%) of alcohol by weight.

"No person shall, after January 1, 1918, use any foods, fruits, food materials, or feeds

in the production of malt liquor, unless he secures a license so to do, to be issued by the Commissioner of Internal Revenue, and complies with rules and regulations to be hereafter promulgated governing the production of such liquor and the alcoholic content; and no person shall import any such liquor except under license to be issued by the Division of Customs, Treasury Department, and in compliance with any rules and regulations governing the importation of such liquors which may be promulgated."

PROCLAMATION AND EXECUTIVE ORDER of September 16, 1918, prohibiting manufacture of malt liquors, viz.:

"Whereas, under and by virtue of an act of Congress, entitled 'An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel,' approved by the President on August 10, 1917, it is provided in Section 15, among other things, as follows:

'Whenever the President shall find that limitation, regulation, or prohibition of the use of foods, fruits, food materials, or feeds in the production of malt or vinous liquors for beverage purposes, or that reduction of the alcoholic content of any such malt or vinous liquor, is essential, in order to assure an adequate and continuous supply of food, or that the national security and defense will be subserved

thereby, he is authorized, from time to time, to prescribe and give public notice of the extent of the limitation, regulation, prohibition, or reduction so necessitated. Whenever such notice shall have been given and shall remain unrevoked, no person shall, after a reasonable time prescribed in such notice, use any foods, fruits, food materials, or feeds in the production of malt or vinous liquors, or import any such liquors except under license issued by the President and in compliance with rules and regulations determined by him governing the production and importation of such liquors and the alcoholic content thereof.'

"Now, therefore, I, Woodrow Wilson, President of the United States of America, by virtue of the powers conferred on me by said Act of Congress, do hereby find and determine that it is essential, in order to assure an adequate and continuous supply of food, in order to subserve the national security and defense, and because of the increasing requirements of war industries for the fuel productive capacity of the country, the strain upon transportation to serve such industries, and the shortage of labor caused by the necessity of increasing the armed forces of the United States, that the use of sugar, glucose, corn, rice, or any other foods, fruits, food materials and feeds in the production of malt liquors including near beer, for beverage purposes be prohibited. And by this Proclamation I prescribe and give public notice that on

and after October 1st, 1918, no person shall use any sugar, glucose, corn, rice or any other foods, fruits, food materials or feeds, except hops and malt now already made, in the production of malt liquors, including near beer, for beverage purposes, whether or not such malt liquors contain alcohol, and on and after December 1st, 1918, no person shall use any sugar, glucose, corn, rice or any other foods, fruits, food materials or feeds, including malt, in the production of malt liquors, including near beer, for beverage purposes, whether or not such malt liquors contain alcohol.

"In Witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

"Done in the District of Columbia, this 16th day of September in the year of our Lord One Thousand Nine Hundred and Eighteen, and of the Independence of the United States of America the One Hundred and Forty-third.

WOODROW WILSON.

By the President:

ROBERT LANSING,

Secretary of State."

PROCLAMATION AND EXECUTIVE ORDER of January 30, 1919, modifying proclamation of September 16, 1918, so as to permit the manufacture of beverages which are not intoxicating, viz.:

"Whereas, under and by virtue of an Act of Congress entitled 'An Act to Provide fur-

ther for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel,' approved August 10, 1917, the President, on the 16th day of September, 1918, made the following proclamation:

'Now, therefore, I, Woodrow Wilson, President of the United States of America, by virtue of the powers conferred on me by said act of Congress, do hereby find and determine that it is essential, in order to assure an adequate and continuous supply of food, in order to subserve the national security and defense, and because of the increasing requirements of war industries for the fuel productive capacity of the country, the strain upon transportation to serve such industries, and the shortage of labor caused by the necessity of increasing the armed forces of the United States, that the use of sugar, glucose, corn, rice, or any other foods, fruits, food materials and feeds in the production of malt liquors including near beer, for beverage purposes be prohibited. And by this proclamation I prescribe and give public notice that on and after October 1st, 1918, no person shall use any sugar, glucose, corn, rice or any other foods, fruits, food materials or feeds, except malt now already made, and hops, in the production of malt liquors, including near beer, for beverage purposes, whether or not such malt liquors contain alcohol, and on and after December 1st, 1918, no person shall use any sugar, glu-

cose, corn, rice or any other foods, fruits, food materials or feeds, including malt, in the production of malt liquors, including near beer, for beverage purposes, whether or not such malt liquors contain alcohol.'

"And whereas the prohibition of the use of grain in the manufacture of beverages which are not intoxicating has been found by the President to be no longer essential in order to assure an adequate and continuous supply of food:

"Now, therefore, I do hereby modify the aforesaid proclamation made on the 16th day of September, 1918, to the extent of permitting the use of grain in the manufacture of beverages which are not intoxicating.

"In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

"Done this thirtieth day of January in the year of Our Lord One Thousand Nine Hundred and Nineteen, and of the Independence of the United States of America the One Hundred and Forty-third.

WOODROW WILSON.

By the President:
ROBERT LANSING,
Secretary of State."

PROCLAMATION AND EXECUTIVE ORDER of March 4th, 1919, further modifying proclamation of September 16th, 1918, so as to declare that "there is now an abundant supply" of food products, and limiting prohibition of food used in the produc-

tion of intoxicating malt liquors for beverage purposes, viz.:

"Whereas, under and by virtue of an act of Congress entitled 'An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel,' approved August 10, 1917, the President on the 16th day of September, 1918, made a proclamation containing the following prohibition:

'I prescribe and give public notice that on and after October 1, 1918, no person shall use any sugar, glucose, corn, rice or any other foods, fruits, food materials or feeds, except hops and malt now already made, in the production of malt liquors, including near beer, for beverage purposes, whether or not such malt liquors contain alcohol, and on and after December 1st, 1918, no person shall use any sugar, glucose, corn, rice or any other foods, fruits, food materials or feeds, including malt, in the production of malt liquors, including near beer, for beverage purposes, whether or not such malt liquors contain alcohol.'

"And, whereas, the President, under authority of the said act of August 10, 1917, by further proclamation dated January 30, 1919, modified the said proclamation of September 16, 1918, so as to permit the use of grain in the manufacture of beverages which are not intoxicating, such proclamation providing as follows:

'Whereas the prohibition of the use of

grain in the manufacture of beverages which are not intoxicating has been found by the President to be no longer essential in order to assure an adequate and continuous supply of food:

'Now, therefore, I do hereby modify the aforesaid proclamation made on the 16th day of September, 1918, to the extent of permitting the use of grain in the manufacture of beverages which are not intoxicating.'

"And whereas, for the production from a cereal base, of a non-intoxicating beverage, which shall be nutritious and palatable, food products other than grains, of which there is now an abundant supply, but of which the use for such purposes is prohibited by the aforesaid proclamation of September 16, 1918, are required:

"Now, therefore, I, Woodrow Wilson, President of the United States, do hereby amend the aforesaid proclamation of September 16, 1918, by inserting in the first sentence of the prohibiting paragraph, after the words 'production of' the word 'intoxicating' and by striking out of the same sentence the words 'including near beer'; and by inserting in the succeeding sentence in both places where the phrase 'production of malt liquors' occurs, after the words 'production of' the word 'intoxicating,' and striking out the phrases 'including near beer' and 'whether or not such malt liquors contain alcohol' in both places in that sentence where these phrases occur, so that as amended the prohibitory

provisions of said proclamation shall read as follows:

'That the use of sugar, glucose, corn, rice or any other foods, fruits, food materials and feeds in the production of intoxicating malt liquors for beverage purposes be prohibited. And by this Proclamation I prescribe and give public notice that on and after October 1, 1918, no person shall use any sugar, glucose, corn, rice, or any other foods, fruits, food materials or feeds, except hops and malt now already made in the production of intoxicating malt liquors for beverage purposes, and on and after December 1st, 1918, no person shall use any sugar, glucose, corn, rice or any other foods, fruits, food materials or feeds, including malt, in the production of intoxicating malt liquors for beverage purposes, whether or not such malt liquors contain alcohol.'

and the aforesaid Proclamation of September 16, 1918, as thus amended, shall remain in full force and effect.

"In witness whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

"Done this 4th day of March in the year of our Lord One Thousand Nine Hundred and Nineteen and of the Independence of the United States of America the One Hundred and Forty-third.

(Signed) Woodrow Wilson.

Frank L. Polk,

Acting Secretary of State."

EXTRACT FROM PRESIDENT'S MESSAGE TO CONGRESS ON May 20, 1919.

"The demobilization of the military forces of the country has progressed to such a point that it seems to me entirely safe now to remove the ban upon the manufacture and sale of wines and beers, but I am advised that without further legislation I have not the legal authority to remove the present restrictions. I therefore recommend that the act approved November 21, 1918, entitled 'An act to enable the Secretary of Agriculture to carry out, during the fiscal year ending June 30, 1919, the purpose of the act entitled "An Act to provide further for the national security and defense by stimulating agriculture and facilitating the distribution of agricultural products," and for other purposes' be amended or repealed in so far as it applies to wines and beers."

VETO MESSAGE BY THE PRESIDENT OF THE UNITED STATES, October 27, 1919.

TO THE HOUSE OF REPRESENTATIVES:

I am returning, without my signature, H. R. 6810, "an act to prohibit intoxicating beverages, and to regulate the manufacture, production, use and sale of high proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye, and other lawful industries."

The subject matter treated in this measure deals with two distinct phases of the prohibition

legislation. One part of the act under consideration seeks to enforce wartime prohibition. The other provides for the enforcement which was made necessary by the adoption of the constitutional amendment. I object to and cannot approve that part of this legislation with reference to wartime prohibition.

It has to do with the enforcement of an act which was passed by reason of the emergencies of the war and whose objects have been satisfied in the demobilization of the army and navy and whose repeal I have already sought at the hands of Congress. Where the purposes of particular legislation arising out of war emergency have been satisfied, sound public policy makes clear the reason and necessity for repeal.

It will not be difficult for Congress, in considering this important matter, to separate these two questions and effectively to legislate regarding them; making the proper distinction between temporary causes which arose out of wartime emergencies and those like the constitutional amendment of prohibition which is now part of the fundamental law of the country.

In all matters having to do with the personal habits and customs of large numbers of our people we must be certain that the established processes of legal change are followed. In no other way can the salutary object sought or accomplished by great reforms of this character be made satisfactory and permanent.

Woodrow Wilson,

The White House, 27 October, 1919.